No. 97-282-CFX Title: Beth Ann Faragher, Petitioner
v.
City of Boca Raton

Docketed: August 13, 1997 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jul 3 1997	Application (A97-27) to extend the time to file a petition for a writ of certiorari from July 14, 1997 to September 12, 1997, submitted to Justice Kennedy.
	Jul 9 1997	Application (A97-27) granted by Justice Kennedy extending the time to file until August 13, 1997.
	Aug 13 1997	Petition for writ of certiorari filed. (Response due October 14, 1997)
	Sep 5 1997	Order extending time to file response to petition until October 14, 1997.
	Oct 14 1997	Brief of respondent City of Boca Raton, Florida in opposition filed.
	Oct 29 1997	DISTRIBUTED. November 14, 1997
	Nov 14 1997	Petition GRANTED. The petition for a writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 pm, Monday, December 29, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 pm, Wednesday, January 28, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 pm, Wednesday, February 18, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT March 25, 1998. **********
	Dec 29 1997	Joint appendix filed.
	Dec 29 1997	Brief of petitioner Beth Ann Faragher filed.
	Dec 29 1997	Brief amici curiae of National Women's Law Center, et al. filed.
	Dec 29 1997	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
	Dec 29 1997	Brief amicus curiae of AFL/CIO filed.
	Dec 29 1997	Brief amici curiae of United States and Equal Employment Opportunity Commission filed.
	Jan 9 1998	Motion of National Employment Lawyers Association for leave to file a brief as amicus curiae filed.
	Jan 26 1998	Motion of National Employment Lawyers Association for leave to file a brief as amicus curiae GRANTED.
	Jan 27 1998	Brief of respondent City of Boca Raton, Florida filed.
	Jan 27 1998	Brief amicus curiae of Society for Human Resource Management filed.
	Jan 27 1998	Brief amicus curiae of Equal Employment Advisory Council filed.
	Jan 28 1998	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
	Jan 28 1998	Brief amici curiae of National Assn. of Manufacturers, et al. filed.
	Feb 11 1998	CIRCULATED.

2 pp

No. 97-282-CFX

Entry	Date	Proceedings and Orders
	Feb 11 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 18 1998	Reply brief of petitioner Beth Ann Faragher filed.
	Feb 23 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 25 1998	ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

BETH ANN FARAGHER

Petitioner,

vs.

THE CITY OF BOCA RATON, a political subdivision of the State of Florida,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Is an employer, pursuant to common-law principles of agency, responsible for hostile-environment sexual harassment committed by supervisory employees who use their supervisory status to effect the harassment?

II. May a fact-finder infer notice to an employer of hostile-environment sexual harassment:

A. from the same pervasive nature of the harassment that makes it actionable?

B. by default through its failure to effectively disseminate any sexual harassment policy and instructions about how and to whom victims should complain?

C. through actual notice to an intermediate supervisor, who reports it no further?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here include those who appear in the caption of the case, as well as Nancy Ewanchew, who was a co-plaintiff, and Bill Terry and David Silverman, who were co-defendants with the City of Boca Raton. There is no parent or subsidiary of any party to be listed.

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II. The United States Court of Appeals for the Eleventh Circuit has decided important questions of federal law concerning notice to employers of hostile-environment sexual harassment, ones which should be, but have not been, decided by this Court, i.e.:

- whether the same pervasiveness that makes sexual harassment actionable also serves to put an employer on constructive notice?

- whether the failure to effectively disseminate a sexual harassment policy gives rise to constructive knowledge?

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No.

In The

Supreme Court of the United States

October Term, 1997

BETH ANN FARAGHER

Petitioner,

vs.

THE CITY OF BOCA RATON, a political subdivision of the State of Florida,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Beth Ann Faragher, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals are reported at 76 F.3d 1155 (11th Cir. 1996) and 111 F.3d 1530 (11th Cir. 1997) (*en banc*) and are reproduced in the Appendix filed herewith ("App.") at 41a and 1a. The opinion of the district court is reported at 864 F.Supp. 1552 (S.D. Fla. 1994) and is reproduced at 69a.

STATEMENT OF JURISDICTION

The first decision of the United States Court of Appeals for the Eleventh Circuit was rendered on February 8, 1996, and was vacated May 13, 1996, 83 F.3d 1346 (11th Cir. 1996). The *en banc* Court of Appeals decision was rendered April 15, 1997 and amended April 28, 1997.

The Court, through Mr. Justice Kennedy, on July 9, 1997, granted petitioner an extension of time until and including August 13, 1997, within which to file this petition for writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (Title VII), is set forth below:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .

STATEMENT OF THE CASE

The facts of the case and the procedural background are as set forth in the *en banc* opinion of the circuit court of appeals:

> I. Facts[1]
>
> Beth Ann Faragher worked as an ocean lifeguard for the City of Boca Raton, Florida (City), in the Parks and Recreation Department's Marine Safety Section. The City employed Faragher intermittently from

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1. The facts are essentially drawn from the district court's Findings of Fact.

September 1985 until June 1990. During these five years, Bill Terry and David Silverman acted as supervisors of the ocean lifeguards, Terry as Chief of the Marine Safety Section and Silverman as a Marine Safety lieutenant and then captain. Terry had the authority to supervise all aspects of the lifeguards' work assignments; to give oral reprimands and place reports of disciplinary actions in personnel files; and to interview and select new lifeguards, subject to approval by higher management. Silverman supervised the lifeguards' daily duties, including designating work assignments and supervising physical fitness routines.

The Marine Safety Section was organized according to a clear chain of command. Lifeguards reported to Marine Safety lieutenants, and above them to captains; the captains reported directly to the Chief of the Marine Safety Section, who was directly supervised by the Recreation Superintendent; the Recreation Superintendent reported to the Director of Parks and Recreation, who reported to the City Manager. Lifeguards had little contact with City officials. Marine Safety Headquarters was at the beach — in a remote location, far away from City Hall.

Marine Safety Chief Terry subjected Faragher and another lifeguard, Nancy Ewanchew, to uninvited and offensive touching, and lieutenant Silverman made

offensive comments and gestures to both Faragher and Ewanchew. In particular, Faragher testified that over the course of her five years of employment Terry touched her shoulders or waist on a number of occasions, patted her thigh once in April 1990, and slapped her on the rear end. Ewanchew testified about two specific incidents where Terry touched her in a sexually offensive manner. However, neither Faragher nor Ewanchew complained to Parks and Recreation Department management about Terry's and Silverman's conduct while they were employed with the City or when they resigned. They both did speak about Terry's and Silverman's conduct with one of their supervisors, Marine Safety lieutenant and Training Captain Robert Gordon. In fact, most of the female lifeguards complained to Gordon about Silverman's language and conduct. The lifeguards did not speak with Gordon on a subordinate to superior basis; they spoke with him as a friend whom they held in high repute. Gordon did not report the complaints to his supervisor, Terry, or to any other City official.

Ewanchew resigned from her position with the City in April of 1989, saying that she was leaving because she had found a better job. Faragher resigned in June of 1990 to attend law school. In April of 1990, Ewanchew wrote a letter to the City's Director of Personnel complaining

that she and other female lifeguards had been sexually harassed by Terry and Silverman while she was employed by the City. The City did not know about Terry's and Silverman's conduct until receiving Ewanchew's letter. The City then investigated Ewanchew's complaint and determined that Terry and Silverman had engaged in some inappropriate conduct. The City reprimanded and disciplined them both.

II. Procedural background

In 1992, Faragher sued the City, Terry, and Silverman. Faragher sued the City for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Count I). Faragher sued Terry and Silverman for sexual harassment under 42 U.S.C. § 1983 (Counts II and III). Faragher also asserted pendent state law claims, suing Terry for battery (Counts IV and V) and the City for negligent retention and supervision of Terry (Counts VI and VII). The district court held a non-jury trial on all claims.

The district court entered judgment for Faragher on her Title VII claim against the City, awarding her $1 in nominal damages.[2] The court held that Terry's and Silverman's offensive conduct was sufficiently severe and pervasive to alter the conditions of Faragher's employment by

creating a hostile work environment. The court held that the City was directly liable for Terry's and Silverman's conduct under agency principles based on Terry's and Silverman's supervisory authority and the overall workplace structure. In addition, the court held that the City was indirectly liable for Terry's and Silverman's offensive conduct because the conduct was severe and pervasive and supported "an inference of knowledge, or constructive knowledge, on the part of the City regarding Terry's and Silverman's sexual harassment." (R.6-166 at 23.) Faragher appealed and the City cross appealed. A panel of this court reversed the district court's judgment for Faragher on her Title VII sexual harassment claim against the City, but

---

2. The district court awarded Faragher $10,000 in compensatory damages on her § 1983 claim against Terry and Silverman, jointly and severally, and $500 in punitive damages on her battery claim against Terry. Additionally, the district court entered judgment for Ewanchew on her battery claim against Terry and awarded her $35,000 in compensatory damages and $2,000 in punitive damages.

> affirmed the judgment in all other respects. *Faragher v. City of Boca Raton*, 76 F.3d 1155 (11th Cir. 1996). That panel opinion was vacated and rehearing en banc was granted. *Faragher v. City of Boca Raton*, 83 F.3d 1346 (11th Cir. 1996).

111 F.3d at 1533-1534. n. 1, n. 2 (App. at 103a-104a).

The Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court's final decision.

The *en banc* court, in a 7-5 decision with three dissents, then reversed the district court on the issue of Title VII liability, holding:

> ***One***, the city was not indirectly, or vicariously, liable because neither Terry or Silverman was acting within the scope of his employment when he perpetrated the sexual harassment or was aided in perpetrating the harassment by the existence of any agency relationship with the city.
>
> ***Two***, the city was not directly liable because it neither knew, nor should have known, about the sexual harassment—notwithstanding that the sexual harassment was pervasive, that the city had failed to effectively disseminate its sexual harassment policy, and that Faragher and Ewanchew (as well as other women) had reported it to another lifeguard captain.

REASONS FOR GRANTING THE WRIT.

I.

The United States Court of Appeals for the Eleventh Circuit has entered a decision that is in conflict with the decision of at least two other United States courts of appeals on the issue of how the principles of agency should be applied in hostile environment sexual harassment cases.

The Court should grant the petition for a writ of certiorari to establish uniformity amongst the circuits in the application of the agency principles to which this

Court commended the lower courts in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). [1], [2]

---

[1] This Court in *Meritor* "decline[d]... to issue a definitive rule on employer liability, but... agree[d] with the [Equal Employment Opportunity Commission] that Congress wanted courts to look to agency principles for guidance in this area." 477 U.S. at 72.

> [W]hile such common law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. *See generally* Restatement (Second) of Agency, §§ 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Id.*

Id.

[2] Section 219 of the Restatement (Second) of Agency provides as follows:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or

(continued...)

The circuits now conflict. Division exists between the Eleventh[3] and District of Columbia Circuits[4] on one side, and the Second[5] and Tenth[6] Circuits on the other.[7]

The court below held that, as it interprets the principles of agency, there are only three ways that a n employer can be indirectly liable for the conduct of its agents:

> [G]enerally, an employer may be indirectly liable for hostile environment sexual

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[2](...continued)

> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in Accomplishing the tort by the existence of the agency relation.

[3] *Faragher* v. *the City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (*en banc*).

[4] *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 569, 133 L.Ed.2d 493 (1995).

[5] *Torres v. Pisano*, 116 F.3d 625 (2nd Cir. 1997); *Karibian v. Columbia University*, 14 F.3d 773, 780 (2nd Cir.), *cert. denied*, 512 U.S. 1213 (1994).

[6] *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987).

[7] *See Davis v. City of Sioux City*, 115 F.3d 1365, 1372 (8th Cir. 1997) Arnold, C.J., dissenting, for a fuller collection of cases on both sides of the issue.

> harassment by a superior: (1) if the harassment occurs within the scope of the superior's employment; (2) if the employer assigns performance of a non-delegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass his subordinate. *See* Restatement (Second) of Agency § 219(1), (2)(c), (2)(d).

Faragher, 111 F.3d at 1534.

In its discussion of the agency issue, the court of appeals even pointed out the differences in the ways in which the several circuits apply the agency principles to which this Court referred them in *Meritor*:

> Subsequent to *Meritor*, the circuits differ on the appropriate test to apply in a hostile work environment case involving sexual harassment of an employee by the employer's supervisor. *See, e.g., Kauffman v. Allied Signal*, 970 F.2d 178, 184 (6th Cir. 1992)(holding that the plaintiff must establish that a supervisor's harassment was within the scope of his employment and that the employer failed to respond adequately and effectively when it learned of the harassment); *Paroline v. Unisys Corp.*, 879 F.2d 100, 104, 106-07 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (4th Cir. 1990)(holding that the proper inquiry is whether the individual defendant served in a supervisory position in which he

> exercised "significant control over the plaintiff's hiring, firing or conditions of employment;" and, if not, whether employer had actual or constructive knowledge of the existence of a hostile work environment and took no prompt and adequate remedial steps); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418 (10th Cir. 1987)(holding that employer liability could arise under the principles of Restatement § 219(2) if: (1) the employer was negligent or reckless; or (2) the employee relied on the supervisor's apparent authority; or (3) the supervisor was aided in his harassment by the existence of the agency relationship); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3rd Cir. 1990)(holding that the plaintiff must prove that management level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action); and *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515-16 (9th Cir. 1989)(holding that "employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known").

This Circuit has concluded that in a pure hostile environment case, a supervisor's harassing conduct is typically outside the scope of his employment. *See*

> *Steele*,[8] 867 F.2d at 1311 (11th Cir. 1989); *accord Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996)(holding that illegal sexual harassment is an illegitimate corporate activity, beyond the scope of the supervisor's employment)....

111 F.3d at 1535-1536 (App. at 9a).

The court of appeals then moved to the use-of-agency issue, aligning itself with the Court of Appeals for the District of Columbia Circuit in adopting a restrictive view of a perpetrator's use of his agency to accomplish sexual harassment and stating that

> [I]n one sense, a supervisor is always aided in accomplishing hostile environment sexual harassment by the existence of an agency relationship with his employer because his responsibilities include close proximity to and regular contact with the victim. *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir.), cert. denied __U.S. __, 116 S.Ct. 569 (1995). However, the common law rule does not use "aided" in such a broad sense. Rather, the employer is liable only if the harassment is accomplished by an instrumentality of the agency or through conduct associated with the agency status.

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[8] *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989).

> *Id.* [Footnote omitted.] In *Sparks*,[9] for example, the harasser used the authority delegated to him by the company to assist in the harassment: He repeatedly reminded the victim that he could fire her if she refused his advances. *Sparks*, 830 F.2d at 1560; *see also Steele*, 867 F.2d at 1317 (limiting holding of *Sparks* to situations involving both quid pro quo and hostile environment harassment).

After the court of appeals rendered its *en banc* decision, the Court of Appeals for the Tenth Circuit, in the *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), while not mentioning the case at bar, criticized *Gary*, upon which the *en banc* majority based its reasoning, and suggested that the better view of the application of agency principles to hostile environment sexual harassment cases is that more expansive one set out in *Karibian v. Columbia University*, 14 F.3d 773, 780 (2nd Cir.), *cert. denied*, 512 U.S. 1213 (1994) ("[A]n employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship....). The *Harrison* court, applying a different analysis to § 219 of the Restatement of Agency than either the *en banc* court or the *Gary* court, set forth a considerably more expansive list of criteria under which a corporate employer might be held liable:

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[9] *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

In summary, an employer in this circuit can be held liable under Title VII for hostile work environment sexual harassment committed by one of its supervisors if any of the following conditions are met:

1) The supervisor committed the harassment while acting in the scope of his employment. *See* Restatement (Second) of Agency § 219(1). (As previously indicated, this will rarely be a basis for employer liability.)

2) The employer knew about, or should have known about, the harassment and failed to respond in a reasonable manner. *See* Restatement (Second) of Agency § 219(2)(b).

3) If the employer manifested in the supervisor the authority to act on its behalf, such manifestation resulted in harm to the plaintiff, and the plaintiff acted or relied on the apparent authority in some way. *See* Restatement (Second) of Agency § 219(2)(d), clause 1.

4) If the employer delegated the authority to the supervisor to

> control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment. *See* Restatement (Second) of Agency § 219(2)(d), clause 2.

Harrison, 112 F.3d at 1446.

The Second Circuit Court of Appeals, meanwhile, on June 3, 1997, articulated a slightly different set of standards in *Torres v. Pisano*, 116 F.3d 625 (2nd Cir. 1997), but one more closely in line with the *Harrison* standards than with the standards articulated in the case at bar and based generally on the notion expressed in *Karibian*. The *Torres* court stated:

> To recap, an employer will be held liable for the harassment perpetrated by one of its supervisors if:
>
> a) the supervisor was at a sufficiently high level in the company, or
>
> b) the supervisor used his actual or apparent authority to further the harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship, or

c) the employer provided no reasonable avenue for complaint, or

d) the employer knew (or should have known) of the harassment but unreasonably failed to stop it.

Torres, 116 F.3d at 625 (footnotes omitted). The *Torres* court then discussed a supervisor's use of his agency as follows:

> Thus, in order to establish liability on the theory that the supervisor exploited the agency relationship in committing the harassment, a plaintiff "must allege facts which establish a nexus between the supervisory authority" and the harassment. *Tomka*,[10] 66 F.3d at 1306.... Cases in which it has been held that the supervisor was aided in the harassment by the existence of the agency relationship have universally involved a more direct use of authority than Torres has pointed to in this case. *See e.g.*, *id.* at 1306-07 (supervisor convened business dinner and implied that employees were required to attend; supervisor then fostered alcohol consumption at the dinner, which led to sexual assault); *Karibian*, 14 F.3d at 776 (supervisor told plaintiff that she "owed him" for all that he had done for her as her supervisor, and varied "her raises, hours,

[10] *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2nd Cir. 1995).

> autonomy and flexibility" according to her responsiveness to his sexual advances); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1352-53 (4th Cir. 1995) ("[Plaintiff] specifically testified that [her supervisor] relied upon the authority vested in him by [the employer] to coerce her to comply with his demands. [The supervisor] assertedly told [plaintiff] that if she failed to submit to him she would lose her job, and [plaintiff] testified that she knew that if she had reported [the supervisor's] conduct to anyone she would have been fired."); *DiLaurenzio*,[11] 926 F. Supp. at 315-16 (supervisor ordered employees to call plaintiff at her home to harass her on days when she was sick; supervisor also threatened to retaliate against any employee who complained)....

Torres, 116 F.3d at 625 (brackets, other than footnotes, in original).

In the instant case, the *en banc* majority — after setting forth in the statement of facts the wide bounds of Terry and Silverman's sway, which one dissenter referred to as "virtually unchecked authority over the work environment" and another characterized as "complete authority to set the workplace environment" — discounted the perpetrators' use of their agency to effect the harassment, stating:

> No person threatened to fire or demote Faragher for refusing to

[11] *DiLaurenzio v. Atlantic Paratrans, Inc.*, 926 F. Supp. 310, 314 (E.D.N.Y. 1996).

> accommodate Terry's and Silverman's harassing overtures. Moreover, the harassment cannot reasonably be viewed as conduct associated with Terry's and Silverman's status as agents of the City.... And there is no evidence that either Terry or Silverman made any employment decisions based upon Faragher's response to their sexual overtures....

Faragher, 111 F.3d at 1537; App. at 13a.

Such reasoning establishes within the Eleventh Circuit a higher hostile-environment burden than elsewhere, virtually requiring a plaintiff to make out a *quid pro quo* case to impose liability on a corporate defendant for its supervisor's behavior. It ignores the principles of agency that this Court directed in *Meritor* be followed. For as the *Harrison* court observed, "the fact that the supervisor has actual or apparent authority to control the victim's working conditions, and is aided in harassing the victim by that authority, is sufficient to establish employer liability under the second clause of § 219(d)(2)." *Harrison*, 112 F.3d at 1450.

The divergence of the two lines of authority, *Faragher* and *Gary* on the one hand, and *Torres/Karibian* and *Harrison/Hicks* on the other, requires this Court's intervention through the grant of the writ to the Eleventh Circuit to achieve uniformity amongst the circuits.

II.

The United States Court of Appeals for the Eleventh Circuit has decided important questions of federal law concerning notice to employers of hostile-environment sexual harassment, ones which should be, but have not been, decided by this Court, i.e.:

- **whether the same pervasiveness that makes sexual harassment actionable permits a fact-finder to infer constructive notice to the employer?**
- **whether the failure to effectively disseminate a sexual harassment policy gives rise to constructive knowledge?**
- **whether the actual knowledge of an employer's "agent" who is not part of "higher management" constitutes notice to the employer?**

The Court should grant the Petition for a Writ of Certiorari and should decide what constitutes knowledge of hostile-environment sexual harassment by an employer. That question has not been, but should be, settled by this Court.

While the circuits appeared previously to be in agreement on what constituted actual or constructive knowledge of hostile-environment sexual harassment, and while the Court of Appeals for the Eleventh Circuit appeared to be in line with them, *see Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), the *en banc* court's opinion raises, and resolves, the following novel issues adversely to plaintiffs:

One, does a fact-finders determination of the "pervasiveness" that is necessary under *Harris v. Forklift Systems, Inc.*, __U.S. __, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) for workplace behavior to be actionable permit an inference of constructive knowledge on the part of the employer.

Two, does a failure to effectively disseminate a sexual harassment policy – which the district court found to have occurred – give rise to constructive knowledge on the part of the employer.

Three, does actual notice to a supervisor, whom the district court characterized as not being part of "higher management," *Faragher*, 864 F.Supp. at 1556; at 72a, constitute actual knowledge by the employee.

The Equal Employment Opportunity Commission sexual harassment guidelines provide in pertinent part:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

29 C.F.R. § 1604.11(d).

While the courts of appeals generally have parroted the know-or-should-have-known mantra, none have sought to define it as did the court of appeals in the instant case.

On the pervasiveness issue, the court below stated that "[a]ccording to the [district] court, the pervasiveness analysis applicable to finding that the work environment

was abusive is the same as the analysis required to show the employer's knowledge." 111 F.3d at 1538; App. at 15a-16a. The court of appeals then went on to hold:

> We agree with the district court that the analyses are the same to the extent that a court must evaluate the totality of the circumstances both in determining whether the work environment was abusive and in determining whether the conduct was pervasive enough to put the employer on notice. But we do not agree with the district court's apparent belief that simply because conduct is pervasive enough to create an abusive work environment the employer should be charged with knowledge of the conduct. The question of notice to the employer is distinct from the question of the environment's abusiveness. Thus, the district court erred to the extent that it conflated the two inquiries.[10]
>
> ---
>
> 10. It does not follow in this case that because there was an abusive environment the City necessarily had constructive knowledge of Terry's and Silverman's harassment. However, there may be other cases in which the same level of pervasiveness can support a finding both of hostile environment and constructive notice.

111 F.3d at 1538 & n. 10.

As is noted by one of the dissenters: "However, there is no support in either logic or the law for such a proposition. The majority can cite to no case which holds

that the same level of pervasiveness cannot support the same finding of a hostile environment and constructive notice...." 111 F.3d at 1540, Barkett, J., dissenting; App. at 21a-22a. "Moreover," the dissent observed, "the majority seems to collapse the two distinct inquiries of actual knowledge and constructive knowledge into one, requiring actual knowledge before imposing liability...." Id. at 1540-1541; App. at 22a.

The court of appeals gave cursory treatment to the city's failure to effectively promulgate any sexual harassment policy,[12] dismissing it thus in a footnote:

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[12] The district court stated in its findings of fact the following concerning the sexual harassment policy:

> 51. The City had a written sexual harassment policy, promulgated on February 26, 1986. The policy was contained in a memorandum from the City Manager, addressed to all employees. On May 7, 1990, the City revised and reissued its policy against sexual harassment in the form of a Personnel Policy and Procedure memorandum.
>
> 52. Notwithstanding the existence of a written policy against sexual harassment, the Court finds a complete failure on the part of the City to disseminate said policy among Marine Safety Section employees. Neither Terry nor Silverman were ever told or made aware of the City's sexual harassment policy prior to [the City's personnel director's] investigation of Ewanchew's charges. Ewanchew herself never got a copy of the sexual harassment policy during her tenure with the City. The City, therefore, did not discharge its duty under the [Equal Employment Opportunity Commission] guidelines regarding the maintenance of an effective sexual harassment policy.

(continued...)

> There is some evidence that the City did not effectively disseminate among Marine Safety employees its sexual harassment policy. The district court did not find that the City would have known about the harassment if it had effectively disseminated this policy; and indeed, the record indicates that failure to disseminate this policy was not the reason why the City did not know about the harassment.

111 F.3d at 1538, n. 11.

One of the dissenters on the court of appeal underscored the mischief that the majority's treatment of the issue could set loose:

> [T]he City had a policy against sexual harassment in the workplace. The City, however, did not communicate the policy to the employees of the Marine Safety Section or identify the person to whom complaints

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[12](...continued)

> 53. The same union bargaining unit has represented the lifeguards and lieutenants working for the marine Safety division since sometime before 1985. The unit has a collective bargaining agreement with the city, which includes an employee grievance and arbitration procedure. Faragher and Ewanchew did not initiate grievance proceedings. In light of the City's lack of dissemination of its sexual harassment policy, the Court finds that Faragher and Ewanchew's failure to avail themselves of grievance proceedings, in and of itself, does not excuse the City from responsibility for the conduct of Terry and Silverman.

864 F.Supp. at 1560-61 , App. at 83a-84a.

> of sexual harassment were to be made. Thus, the City effectively concealed from those employees the avenue for redress of grievances. This concealment troubles me for three reasons. First, I fear that the court's opinion dilutes the employer's duty under Title VII to maintain a workplace free of severe and pervasive sexual harassment. Second, the court's opinion places an undue burden on employees who wish to complain of harassment in the workplace. Third, the court's opinion has the potential to breed disrespect for the law.

111 F.3d at 1546, Tjoflat, J., *dissenting*; App. at 36a.

Judge Tjoflat then went on to catalogue how the majority's opinion:

- provides a model for other businesses who "might choose to follow the City's footsteps . . . by having a policy against sexual harassment but concealing from its employees the identity of the person to whom claims are to be made [since] . . . such concealment would have the potential for reducing claims of sexual harassment." *Id;* App. at 37a.
- discourages employees from making complaints by not clearly delineating to whom they should be made, lest they complain to the wrong person, suffer the embarrassment and disruption attendant to such a complaint, but have it be for naught. *Id.* at 1547; App. at 38a.

- breeds disrespect for the law by making Title VII enforcement into "a game to be played with cards dealt from a deck composed of law of agency principles," the object of which game "is to escape Title VII liability without affording employees the protection that Title VII purports to provide." *Id.*

The dissent's concerns are not chimerical. Iimplicit in *en banc* majority's treatment of the policy-dissemination issue is a dilution of the requirement that employers who seek to avoid liability for co-worker and supervisor sexual harassment provide what the Court of Appeals for the Second Circuit has referred to as "a reasonable avenue for complaint..." *Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2nd Cir. 1992).

Finally, there is the issue of the notice to the city through the lifeguard captain,[13] Gordon, to whom "several lifeguards complained," which the majority discounts because "Gordon did not receive that information as the City's agent; he received it as a friend held in high repute by his colleagues." 111 F.3d at 1538, n.9. "When plaintiffs complained to him, he indicated that the City did not care." 111 F.3d at 1547, Anderson, J., *dissenting*. While both the trial court and the court of appeals dismissed Gordon as not being "higher management," 111 F.3d at 1538; 864 F. Supp. at 1556, his position as a supervisor to whom several women lifeguards were complaining about sexual harassment, and who expressed an opinion of non-

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[13] Although the *en banc* opinion refers to Gordon as a lieutenant, 111 F.3d at 1538 and n. 9, he actually was a captain, as the trial court found. 864 F. Supp. at 1559; App. at 82a.

concern, further raises at least the issue of constructive knowledge.

In summary, the *en banc* majority has raised important questions about federal law and has answered those questions adversely to sexual-harassment plaintiffs without reliance on any authority. Those issues, which go to the very heart of enforcement of federal laws proscribing work-place sexual harassment, should be answered by this Court. Thus, the Court should issue the writ.

CONCLUSION

Based on the authorities cited and the argument presented, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Appendix

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED APRIL 15, 1997

United States Court of Appeals,

Eleventh Circuit.

No. 94-4878.

Beth Ann FARAGHER, Nancy Ewanchew, Plaintiffs-Appellants-Cross-Appellees,

v.

CITY OF BOCA RATON, a political subdivision of the State of Florida, Defendant-Appellee-Cross-Appellant,

Bill Terry, David Silverman, Defendants-Appellees.

April 15, 1997.

As Amended April 28, 1997*.

Appeal from the United States District Court for the Southern District of Florida (No. 92-8010-Civ-Highsmith), Shelby Highsmith, District Judge.

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* Judge Barkett's dissent, in which Chief Judge Hatchett and Senior Judge Kravitch join, is amended. All other opinions remain the same.

Before HATCHETT, Chief Judge, TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges, and DYER** and KRAVITCH***, Senior Circuit Judges.

COX, Circuit Judge:

I. Facts[1]

Beth Ann Faragher worked as an ocean lifeguard for the City of Boca Raton, Florida (City), in the Parks and Recreation Department's Marine Safety Section. The City employed Faragher intermittently from September 1985 until June 1990. During these five years, Bill Terry and David Silverman acted as supervisors of the ocean lifeguards, Terry as Chief of the Marine Safety Section and Silverman as a Marine Safety lieutenant and then captain. Terry had the authority to supervise all aspects of the lifeguards' work assignments; to give oral reprimands and place reports of disciplinary actions in personnel files; and to interview and select new lifeguards, subject to approval by higher management. Silverman supervised the lifeguards' daily duties, including designating work assignments and supervising physical fitness routines.

** Senior U.S. Circuit Judge Dyer elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

*** Senior U.S. Circuit Judge Kravitch was in regular active service when this matter was originally submitted but has taken senior status effective January 1, 1997. She elected to participate in this decision pursuant to 28 U.S.C. § 46 (1996).

1 The facts are essentially drawn from the district court's Findings of Fact.

The Marine Safety Section was organized according to a clear chain of command. Lifeguards reported to Marine Safety lieutenants, and above them to captains; the captains reported directly to the Chief of the Marine Safety Section, who was directly supervised by the Recreation Superintendent; the Recreation Superintendent reported to the Director of Parks and Recreation, who reported to the City Manager. Lifeguards had little contact with City officials. Marine Safety Headquarters was at the beach–in a remote location, far away from City Hall.

Marine Safety Chief Terry subjected Faragher and another lifeguard, Nancy Ewanchew, to uninvited and offensive touching, and lieutenant Silverman made offensive comments and gestures to both Faragher and Ewanchew. In particular, Faragher testified that over the course of her five years of employment Terry touched her shoulders or waist on a number of occasions, patted her thigh once in April 1990, and slapped her on the rear end. Ewanchew testified about two specific incidents where Terry touched her in a sexually offensive manner. However, neither Faragher nor Ewanchew complained to Parks and Recreation Department management about Terry's and Silverman's conduct while they were employed with the City or when they resigned. They both did speak about Terry's and Silverman's conduct with one of their supervisors, Marine Safety lieutenant and Training Captain Robert Gordon. In fact, most of the female lifeguards complained to Gordon about Silverman's language and conduct. The lifeguards did not speak with Gordon on a subordinate to superior basis; they spoke with him as a friend whom they held in high repute. Gordon did not report the complaints to his supervisor, Terry, or to any other City official.

Ewanchew resigned from her position with the City in April of 1989, saying that she was leaving because she had found a better job. Faragher resigned in June of 1990 to attend law school. In April of 1990, Ewanchew wrote a letter to the City's Director of Personnel complaining that she and other female lifeguards had been sexually harassed by Terry and Silverman while she was employed by the City. The City did not know about Terry's and Silverman's conduct until receiving Ewanchew's letter. The City then investigated Ewanchew's complaint and determined that Terry and Silverman had engaged in some inappropriate conduct. The City reprimanded and disciplined them both.

II. Procedural Background

In 1992, Faragher sued the City, Terry, and Silverman. Faragher sued the City for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Count I). Faragher sued Terry and Silverman for sexual harassment under 42 U.S.C. § 1983 (Counts II and III). Faragher also asserted pendent state law claims, suing Terry for battery (Counts IV and V) and the City for negligent retention and supervision of Terry (Counts VI and VII). The district court held a non-jury trial on all claims.

The district court entered judgment for Faragher on her Title VII claim against the City, awarding her $1 in nominal damages.[2] The court held that Terry's and

[2] The district court awarded Faragher $10,000 in compensatory damages on her § 1983 claim against Terry and Silverman, jointly and severally, and $500 in punitive damages on her battery claim against Terry. Additionally, the district court entered judgment for Ewanchew on her battery claim against Terry and awarded her $ 35,000 in compensatory damages and $2,000 in punitive damages.

Silverman's offensive conduct was sufficiently severe and pervasive to alter the conditions of Faragher's employment by creating a hostile work environment. The court held that the City was directly liable for Terry's and Silverman's conduct under agency principles based on Terry's and Silverman's supervisory authority and the overall workplace structure. In addition, the court held that the City was indirectly liable for Terry's and Silverman's offensive conduct because the conduct was severe and pervasive and supported "an inference of knowledge, or constructive knowledge, on the part of the City regarding Terry's and Silverman's sexual harassment." (R.6-166 at 23.)

Faragher appealed and the City cross appealed. A panel of this court reversed the district court's judgment for Faragher on her Title VII sexual harassment claim against the City, but affirmed the district court's judgment in all other respects. *Faragher v. City of Boca Raton*, 76 F.3d 1155 (11th Cir.1996). That panel opinion was vacated and rehearing en banc was granted. *Faragher v. City of Boca Raton*, 83 F.3d 1346 (11th Cir.1996).

III. Issues on Appeal

We address two issues in this opinion:[3] First, whether the City may be liable under Title VII for Terry's and Silverman's hostile environment sexual harassment of Faragher, regardless of its actual or constructive knowledge of that harassment; and second, whether the City knew or should have known of Terry's and Silverman's hostile environment harassment of Faragher.

[3] The parties present additional issues that do not merit further discussion. We affirm as to those issues. *See* 11th Cir. R. 36 – 1. IV.

IV. Standards of Review

We review the district court's finding of fact under the clearly erroneous standard of review. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). We review the district court's conclusions of law and its application of law to facts *de novo*. *Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc.*, 3 F.3d 1472, 1475 (11th Cir.1993), *cert. denied*, 513 U.S. 808, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994).

V. Contentions of the Parties

Faragher contends that Terry's and Silverman's positions as top lifeguard commanders make them prototypical agents of the City. Faragher argues that this status, combined with Terry's and Silverman's conduct, makes the City liable for hostile environment sexual harassment. In addition, Faragher argues that the harassment was so pervasive that the City should be charged with constructive knowledge of Terry's and Silverman's conduct.

The City argues that it cannot be held liable under agency principles for Terry's and Silverman's conduct because there is no evidence which supports a finding either that Terry and Silverman were acting within the scope of their authority in harassing Faragher, or that they were aided in accomplishing the harassment by the existence of their agency relationships with the City. The City further contends that the evidence is insufficient to support the trial court's finding that the City had constructive notice of Terry's and Silverman's conduct.

VI. Discussion

A. *The City is not indirectly liable for Terry's and Silverman's conduct.*

This case requires us to accommodate the Supreme Court's mandate in *Meritor Savings Bank v. Vinson* that federal courts use traditional agency principles when deciding hostile environment sexual harassment cases, but simultaneously "place some limits on the acts of employees for which employers under Title VII are to be held responsible." 477 U.S. 57, 72, 106 S.Ct. 2399, 2408, 91 L.Ed.2d 49 (1986).

Because the Eleventh and all other circuits employ agency principles in the realm of hostile environment sexual harassment, this opinion utilizes the language of traditional agency case law. Under this approach, direct liability and indirect liability are distinct concepts and form the only possible bases for an employer's liability. An employer is directly liable for hostile environment sexual harassment if it knew, or upon reasonably diligent inquiry should have known, of the harassment and failed to take immediate and appropriate corrective action. *See Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir.1989); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir.1982).[4] Under this theory of direct liability, the City can be held liable for its own negligence or recklessness, but not for the conduct of its supervisors or employees.

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[4] These cases refer to this type of liability as "indirect" liability. However, as courts long have done outside the realm of Title VII sexual harassment analyses, we are now marrying the common law agency terms to their proper, traditional common law principles. This alteration can promote ease of reference to the underlying common law agency principles.

In contrast, an employer is indirectly, or vicariously, liable for the wrongful conduct of its agent, whether or not the employer knew or should have known about the agent's wrongful act. Generally, an employer may be indirectly liable for hostile environment sexual harassment by a superior: (1) if the harassment occurs within the scope of the superior's employment; (2) if the employer assigns performance of a non-delegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass his subordinate. *See* Restatement (Second) of Agency § 219(1), (2)(c), (2)(d).

Subsequent to *Meritor,* the circuits differ on the appropriate test to apply in a hostile work environment case involving sexual harassment of an employee by the employer's supervisor. *See, e.g., Kauffman v. Allied Signal,* 970 F.2d 178, 184 (6th Cir.1992)(holding that the plaintiff must establish that a supervisor's harassment was within the scope of his employment and that the employer failed to respond adequately and effectively when it learned of the harassment); *Paroline v. Unisys Corp.,* 879 F.2d 100, 104, 106-07 (4th Cir.1989), vacated in part, 900 F.2d 27 (4th Cir.1990)(holding that the proper inquiry is whether the individual defendant served in a supervisory position in which he exercised "significant control over the plaintiff's hiring, firing or conditions of employment;" and, if not, whether employer had actual or constructive knowledge of the existence of a hostile work environment and took no prompt and adequate remedial steps); *Hicks v. Gates Rubber Co.,* 833 F.2d 1406, 1418 (10th Cir.1987)(holding that employer liability could arise under the principles of Restatement § 219(2) if: (1) the employer was negligent or reckless; or (2) the employee relied on the supervisor's

apparent authority; or (3) the supervisor was aided in his harassment by the existence of the agency relationship); *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3rd Cir.1990)(holding that the plaintiff must prove that management level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action); and *EEOC v. Hacienda Hotel,* 881 F.2d 1504, 1515-16 (9th Cir.1989)(holding that "employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known").

This Circuit has concluded that in a pure hostile environment case, a supervisor's harassing conduct is typically outside the scope of his employment. *See Steele,* 867 F.2d at 1311 (11th Cir.1989); *accord Andrade v. Mayfair Management, Inc.,* 88 F.3d 258, 261 (4th Cir.1996)(holding that illegal sexual harassment is an illegitimate corporate activity, beyond the scope of the supervisor's employment). We noted that:

> Strict liability is illogical in a pure hostile environment setting. In a hostile environment case, no *quid pro quo* exists. The supervisor does not act as the company; the supervisor acts outside "the scope of actual or apparent authority to hire, fire, discipline, or promote."

Steele, 867 F.2d at 1316 (quoting *Henson,* 682 F.2d at 910). Thus, as *Meritor* teaches, employers are not automatically liable for hostile environment sexual harassment by their supervisors or employees.

Instead, this circuit has articulated two agency principles under which an employer may be held indirectly,[5] or vicariously, liable for hostile environment sexual harassment: (1) when a harasser is acting within the scope of his employment in perpetrating the harassment, *see Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558 (11th Cir.1987)(citing Restatement (Second) of Agency § 219(1));[6] and (2) when a harasser is acting outside the scope of his employment, but is aided in accomplishing the harassment by the existence of the agency relationship. *Sparks*, 830 F.2d at 1559-60 (citing Restatement (Second) of Agency § 219(2)(d)). Faragher's claim against the City fails on either theory.

First, neither Terry nor Silverman was acting within the scope of their employment when they perpetrated the harassment. Under well-established common law agency rules, an agent is not acting within the scope of his employment when he is "going on a frolic of his own." *Joel v. Morrison*, 6 C. & P. 501, 172 Eng.Rep. 1338 (1834)(first recorded use of this phrase); *see also Spencer v. Assurance Co. of America*, 39 F.3d 1146, 1149 (11th Cir.1994)(interpreting Florida law). In this scenario, the agent steps outside of his employment to do some act for himself which is not connected to his employer's business. *See* William L. Prosser, § 70 Law of Torts at 461 (4th ed.1982). If the agent has no intention to perform any service for his employer, but instead seeks only to further some personal end, then the act is not within the scope of his employment. *See*, e.g., *Bennett v.*

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[5] The cases that developed these theories of liability referred to them as avenues for "direct" employer liability. For the reasons stated in footnote 2, we use the label "indirect" liability.

[6] This scenario admittedly will be rare after *Steele*.

United States, 102 F.3d 486, 489 (11th Cir.1996)(holding that victim of accidental shooting in army barracks could not hold the United States liable under Georgia respondeat superior principles because employee had undertaken an act purely personal in nature and thus outside the scope of his employment); *Spencer*, 39 F.3d at 1150 (holding that in order for an employee's conduct to be within the scope of his employment Florida law requires that the conduct (1) must have been the kind for which the employee was employed to perform; (2) must have occurred within the time and space limits of his employment; and (3) must have been activated at least in part by a purpose to serve the employment); Restatement (Second) of Agency § 235; *see also* Restatement (Second) of Agency § 236.[7]

In contrast, if it becomes apparent that the act was the agent's way of accomplishing some authorized purpose, then the master cannot avoid liability, even if he has given specific, detailed and emphatic instructions to the contrary. *See* Restatement (Second) of Agency § 230; Prosser, *supra*, at 461.

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[7] The commentary to §§ 235 and 236 makes it clear that scope-of-employment determinations must turn on whether the employee's act was intended to benefit the employer. This "intent" can be discerned from circumstantial evidence which indicates that the employee's act, whether "part" of, or "incidental" to, the employment was in some way authorized by the employer. *See* Comment a, § 235, Comment a, § 236. Thus, "[i]f ... the servant does the very act directed, or does the kind of act which he is authorized to perform within working hours and at an authorized place, there is an inference that he is acting within the scope of employment." Comment a, § 235. *See also Bennett*, 102 F.3d at 494 (noting that Georgia scope-of-employment doctrine focuses on whether the employee has acted to benefit his employer's purpose.)

The contours of this same analysis have guided courts adjudicating agency issues in intentional tort cases. Generally, an employer is held liable for any intentional tort committed by an agent where the purpose of the tort is wholly or in part to further the employer's business. Restatement (Second) of Agency § 245; Prosser, *supra,* at 464. Once again, however, if the agent acts from purely personal motives, he is usually considered to have departed from his employment and his employer is not liable. *Id.* at 465.

The harassment here consisted of offensive comments, gestures and touching. However, the nature of Terry's and Silverman's acts and comments towards Faragher does not support a finding that they were acting within the scope of their employment in subjecting Faragher to offensive language, gestures, and touching. Indeed, there is no evidence that Terry and Silverman harassed Faragher in order to perform any service for the City, or that they were either explicitly or implicitly authorized by the City to engage in such harassment. This case provides the archetypical example of employees stepping outside of the scope of their employment and seeking to further personal ends. Consequently, under this theory of vicarious liability, the City cannot be liable for Terry's and Silverman's harassing conduct.

Second, neither Terry nor Silverman were aided in accomplishing the harassment by the existence of their agency relationship with the City. *See Sparks,* 830 F.2d at 1559-60 (citing Restatement (Second) of Agency § 219(2)(d)). In one sense, a supervisor is always aided in accomplishing hostile environment sexual harassment by the existence of an agency relationship with his employer because his responsibilities include close proximity to and regular contact with the victim. *Gary v. Long,* 59 F.3d

1391, 1397 (D.C.Cir.), *cert. denied* ----- U.S. -----, 116 S.Ct. 569, 133 L.Ed.2d 493 (1995). However, the common law rule does not use "aided" in such a broad sense. Rather, the employer is liable only if the harassment is accomplished by an instrumentality of the agency or through conduct associated with the agency status. *Id.*[8] In *Sparks,* for example, the harasser used the authority delegated to him by the company to assist in the harassment: He repeatedly reminded the victim that he could fire her if she refused his advances. *Sparks,* 830 F.2d at 1560; *see also Steele,* 867 F.2d at 1317 (limiting holding of *Sparks* to situations involving both *quid pro quo* and hostile environment harassment).

No person threatened to fire or demote Faragher for refusing to accommodate Terry's and Silverman's harassing overtures. Moreover, the harassment cannot reasonably be viewed as conduct associated with Terry's and Silverman's status as agents of the City. *See supra* note 8. And, there is no evidence that either Terry or Silverman made any employment decisions based upon Faragher's response to their sexual overtures. *See*

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[8] *Gary* cites, as an example of this type of conduct, Restatement (Second) of Agency § 219, comment e: "Thus a telegraph company may be held liable for a tort committed by a telegraph operator who sends a false telegraph message, as may the undisclosed principal of a store whose manager cheats a customer." *Gary,* 59 F.3d at 1397. The point is that in such cases, [l]iability is based upon the fact that the agent's position facilitates the consummation of the [tort], in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him. *See* Restatement § 219, comment e (citing § 261 in discussion of § 219(2)(d)).

Karibian v. Columbia University, 14 F.3d 773, 780 (2nd Cir.1994)(holding employer liable for hostile environment sexual harassment where supervisor capitalized upon his authority over plaintiff's employment to force plaintiff to endure prolonged, violent and demeaning sexual relationship).

Because Terry and Silverman were not acting within the line and scope of their employment in perpetrating the harassment against Faragher, and because Terry and Silverman were not aided in accomplishing the harassment by the existence of any agency relationship with the City, the district court erred in holding the City of Boca Raton vicariously liable for Terry's and Silverman's harassment of Faragher.

B. *The City is not directly liable for Terry's and Silverman's harassing conduct.*

The district court found that the City had no actual knowledge of the sexual harassment but had constructive knowledge because of the harassment's pervasiveness. The question of constructive knowledge is an issue of fact reviewed for clear error. *Reich v. Department of Conservation and Natural Resources, State of Ala.,* 28 F.3d 1076, 1082 (11th Cir.1994).

The City contends that the district court's finding that the City had constructive notice of the harassment is clearly erroneous and, therefore, that the City may not be held directly liable for the harassment. Faragher responds that the district court's finding that the sexual harassment was severe and pervasive enough to infer the City's knowledge is not clearly erroneous.

An employer is directly liable for hostile work environment sexual harassment if the employer knew or should have known of the harassment and failed to take prompt remedial action. *Steele,* 867 F.2d at 1316; *Henson,* 682 F.2d at 905. A plaintiff can prove an employer's knowledge of harassment by showing she complained to higher management. *Huddleston v. Roger Dean Chevrolet, Inc.,* 845 F.2d 900, 904 (11th Cir.1988). The district court found that Faragher did not complain to higher management at the City. While several lifeguards complained to lieutenant Gordon, the district court found that he did not rank as higher management in the City and, therefore, that notice to him should not be imputed to the City.

A plaintiff also can prove an employer's knowledge by showing that the harassment was pervasive enough to charge the employer with constructive knowledge. *Huddleston,* 845 F.2d at 904; *Henson,* 682 F.2d at 905. The district court believed that its finding that the conduct was sufficiently severe and pervasive to alter the conditions of Faragher's employment "supports an inference of knowledge, or constructive knowledge, on the part of the City regarding Terry's and Silverman's sexual harassment, making the City [directly] liable for such conduct." (R.6-166 at 23-24.) According to the court, the pervasiveness analysis applicable to finding that the work environment was abusive is the same as the analysis

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[9] In its discussion of the City's indirect liability for Terry's and Silverman's conduct the court held that Gordon's knowledge of Terry's and Silverman's conduct provides a basis for holding the City liable. This was error. Gordon did not receive that information as the City's agent; he received it as a friend held in high repute by his colleagues.

required to show the employer's knowledge.

We agree with the district court that the analyses are the same to the extent that a court must evaluate the totality of the circumstances both in determining whether the work environment was abusive and in determining whether the conduct was pervasive enough to put the employer on notice. But we do not agree with the district court's apparent belief that simply because conduct is pervasive enough to create an abusive work environment the employer should be charged with knowledge of the conduct. The question of notice to the employer is distinct from the question of the environment's abusiveness. Thus, the district court erred to the extent that it conflated the two inquiries. [10]

There may be cases in which it is difficult to draw the line where conduct becomes so pervasive that the employer should have known about it. But this is not such a case. The district court expressly found that the City had no knowledge of Terry's and Silverman's conduct. The district court did not find, nor has Faragher pointed to, any factual basis for concluding that the harassment was so pervasive that the City should have known of their conduct. The evidence suggests that just the opposite is true. The lifeguards were stationed at a remote location and had little contact with City officials. The harassment itself occurred intermittently over a long period of time. Faragher worked for the City mostly on a

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[10] It does not follow in this case that because there was an abusive environment the City necessarily had constructive knowledge of Terry's and Silverman's harassment. However, there may be other cases in which the same level of pervasiveness can support a finding both of hostile environment and constructive notice.

part-time and summer basis, and the district court's holding was premised upon a few, discrete instances of harassment. Another lifeguard, Kelly Evans, was a friend of Faragher's, yet the two never discussed sexual harassment and there is no evidence that Ms. Evans was otherwise aware of Terry's and Silverman's harassing behavior towards Faragher. And, as part of her duties as Recreation Superintendent, Sandy Dioli-Kumm occasionally counseled some of the lifeguards. Ewanchew came to see Dioli-Kumm to discuss work-related issues on several different occasions but never mentioned anything about sexual harassment or offensive words or touching by Terry or Silverman; nor is there any evidence that Dioli-Kumm was otherwise aware of such harassment.

Finally, the district court found that the confined space at the lifeguard headquarters building, along with the disproportionate ratio of female to male lifeguards, were in and of themselves conducive to a sort of camaraderie that might be considered "somewhat boisterous." Despite this, however, Ewanchew stated that the atmosphere in the locker room was generally respectful among members of a particular shift.

For the above reasons, the district court clearly erred in finding that the City's knowledge may be inferred from the fact that the conduct was pervasive enough to create an abusive work environment. [11] Thus, because

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[11] There is some evidence that the City did not effectively disseminate among Marine Safety employees its sexual harassment policy. The district court did not find that the City would have known about the harassment if it had effectively disseminated this policy; and indeed, the record indicates that failure to disseminate this policy was not the reason why the City did not know about the harassment.

there was no basis for imputing knowledge of the harassment to the City, and the district court having found that the City had no actual knowledge of the harassment, we hold that the City is not directly liable for Terry's and Silverman's harassment of Faragher.

VII. Conclusion

We reverse the district court's judgment for Faragher on her Title VII sexual harassment claim against the City. In all other respects we affirm the district court's judgment.

AFFIRMED in part; REVERSED in part.

BARKETT, Circuit Judge, dissenting in part and concurring in part, in which HATCHETT, Chief Judge, and KRAVITCH, Senior Circuit Judge, joins:

The question posed in this case explores the circumstances under which an employer can be liable for a supervisor-created hostile environment of sexual harassment. I believe the majority errs in concluding that the city is not liable under the circumstances presented here and misapplies the law in doing so. First, I believe that the majority fails to give appropriate consideration to the responsibility of an employer for the acts of its agents under traditional agency principles, and essentially limits liability to only employers who "knew or should have known" of the hostile environment. Second, even though the majority says that an employer's liability can be based on only constructive knowledge, its analysis effectively requires actual knowledge "of high city officials"–a test at odds with traditional principles of "imputed" corporate

knowledge.[1]

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), although the Supreme Court declined to extend strict liability to hostile environment sexual harassment, it likewise rejected rules which would insulate employers from liability absent actual or constructive notice. Instead, it simply directed courts to look to traditional agency principals to assess an employer's liability for hostile environment sexual harassment. *Id.* at 72-73, 106 S.Ct. at 2408.[2]

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[1] Additionally, the majority errs in engaging in *de novo* review of the district court's factual findings relating to constructive knowledge of reviewing for clear error.

[2] Common law principles of agency are embodied in § 219 of the Restatement (Second) of Agency (1958)[hereinafter "Restatement"]. Section 219 establishes five different theories for assigning liability to employers for the actions of their employees:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
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> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
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> > (a) the master intended the conduct or the consequences, or
> >
> > (b) the master was negligent or reckless, or
> >
> > (c) the conduct violated a non-delegable duty of the master, or

As does the majority, I will discuss these agency concepts in turn.

"Direct Liability"[3]

The majority acknowledges employer liability for supervisor-created hostile environment sexual harassment if the employer knew or should have known of the harassment and failed to take prompt remedial action. *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1512 (11th Cir.1989). Under our case law, an inference of constructive knowledge on the part of the employer can be supported by a finding of pervasive harassment. *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir.1988) (explaining that "[p]laintiff can show that the employer had knowledge by "demonstrating that the harassment was so pervasive that an inference of constructive knowledge arises' "); *Vance*, 863 F.2d at 1512 (stating that a plaintiff "can prove that

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(d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

3. I am using "direct" liability in the same manner as the majority. Under the Restatement, this theory arises under § 219(2)(b), which provides: "(2)A master is not subject to liability for the torts of its servants acting outside the scope of their employment, unless: (b) the master was negligent or reckless." Employer negligence in this context is defined as "failing to remedy ot prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Hirschfield v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 (10th Cir. 1990); *Kauffman v. Allied Signal, Inc.* 970 F.2d 178, 185 (6th Cir.), *cert. denied*, 506 U.S. 1041, 113 S.Ct 831, 121 L.Ed.2d 701 (1992).

the employer knew of the harassment by showing . . . that the harassment was pervasive enough to charge the employer with constructive knowledge").

After a non-jury trial, the district court in this case found that Terry's and Silverman's conduct was "sufficiently severe or pervasive" to constitute hostile environment sexual harassment. The court then ruled that "[t]his finding of pervasiveness supports an inference of knowledge, or constructive knowledge, on the part of the City regarding Terry's and Silverman's sexual harassment...." The determination of constructive notice is based on factual findings which this court will not overturn unless they are clearly erroneous. *See Reich v. Dep't of Conservation and Natural Resources*, 28 F.3d 1076, (11th Cir.1994) (citing *Lewis v. Federal Prison Indus., Inc.*, 786 F.2d 1537, 1543-45 (11th Cir.1986) (reversing as clearly erroneous a district court's finding with respect to whether management knew or should have known that remedial action taken to eliminate age discrimination was ineffective)); *Vance*, 863 F.2d at 1512 (referring to the issue of constructive knowledge of sexual harassment as a "factual determination"). Nonetheless, the majority essentially engages in *de novo* review, substituting the trier of fact's assessment of the record with its own. *See* Majority Op. at 1538.

The majority also purports to find legal error: "[S]imply because conduct is pervasive enough to create an abusive work environment an employer should [not] be charged with knowledge of the conduct. The question of notice to the employer is distinct from the question of the environment's abusiveness. Thus the district court erred to the extent that it conflated the two inquiries." Majority Op. at 1538. However, there is no support in either logic or the law for such a proposition. The

majority can cite to no case which holds that the same level of pervasiveness cannot support the same finding of a hostile environment and constructive notice. In fact, *Vance* states, "Just as the determination of whether conduct is sufficiently 'severe and pervasive' to constitute actionable harassment requires evaluation of the totality of the circumstances, the fact finder [in determining constructive knowledge] must examine the evidence in the same manner. Again, the egregiousness, as well as the number of the incidents, is plainly relevant." *Id.* at 1513. Moreover, the majority seems to collapse the two distinct inquiries of actual knowledge and constructive knowledge into one, effectively requiring actual knowledge before imposing liability. For example, in rejecting the district court's finding of constructive notice the majority notes that "the City had no knowledge" of Terry's and Silverman's conduct; that there was no "factual basis for concluding that the City should have known of their conduct"; that the lifeguards "were stationed at a remote location and had little contact with City officials"; that Faragher never told her friend who also was a lifeguard; and that the Recreation superintendent was never told about the sexual harassment. Majority Op. at 1538. These factors inform an actual knowledge inquiry, not a constructive knowledge inquiry.

For an employer to be charged with knowledge, it is clearly not necessary for the head of the company, its president, or the chairman of the board to have known of the harassment. Indeed, generally the ultimate head or governing board does not have actual knowledge of the action. The very point of ascribing knowledge on a constructive basis is to recognize that liability can be imputed even when the employer has not been "told," i.e., even when there is no actual knowledge. The relevant inquiry for constructive knowledge is what the employer

should have known in the exercise of reasonable care. *Hirschfeld v. New Mexico Corrections Dep't.*, 916 F.2d 572, 577 (10th Cir.1990). Thus, an employer cannot insulate itself from liability by abandoning its employees in a remote location to be supervised by someone who makes their work lives miserable by offensive touching and an atmosphere of sexually offensive comments, suggestions and innuendo.

Terry was the Chief and supervisor of the lifeguard station at which Faragher worked. He clearly had the notice necessary to impute knowledge, and therefore liability, to the City. Under the circumstances presented here, the district court, after hearing and evaluating the evidence, correctly applied the law to the facts of this case and did not commit clear error in finding that the pervasiveness of the harassment supported an inference of constructive notice on the part of the City.

"Indirect Liability "[4]

I also think the majority errs in effectively confining liability to instances where an employer has actual or constructive knowledge. The very purpose of agency is to establish an employer's liability specifically for acts of which it has no knowledge. As Justice Joseph Story explains, a principal

> is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations,

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4. I am using "indirect"liability in the same manner as the majority, that is, according to the principles of agency found in §§ 219-37 of the Restatement.

> torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them.

Joseph Story, Commentaries on the Law of Agency § 452, at 536-37 (5th ed. 1857). This rule of holding a principal liable for the acts of its agent is based on "the consideration that it is the principal who makes it possible for the agent to inflict the injury." 3 Am.Jur.2d *Agency* § 270 (1986). The record here establishes that Terry and Silverman were agents of the City acting within the scope of their employment[5] and were aided in accomplishing the harassment by the existence of an agency relationship.[6]

The majority erroneously assumes that because employers rarely, if ever, expressly authorize supervisors to act in a way that would create a sexually hostile environment, harassment by a supervisor would never fall "within the scope of his employment." The majority erroneously states that "[t]his Circuit has concluded that in a pure hostile environment case, a supervisor's harass-

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5. § 219(1) provides, " A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."

6. § 219(2)(d) provides, "A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless ... the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

ing conduct is typically outside the scope of his employment." Majority Op. at 1535. However, the language from *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir.1989) that the majority cites in support of this proposition merely reiterates *Meritor*'s rule against applying strict liability in hostile environment harassment cases. To the extent that the majority relies on cases from other circuits for the holding that harassment constitutes behavior outside the scope of employment,[7] such cases serve as poor guides since they misconstrue the agency law to which *Meritor* directs us. The Restatement clearly states that "an act, although forbidden, or done in a forbidden manner, may be within the scope of employment." Restatement § 230. The proper inquiry in determining if the agent's actions are "within the scope of employment" is not whether the objectionable conduct was authorized, but whether the conduct is of "the same general nature as that authorized, or incidental to the conduct authorized." Restatement § 229. In making that determination, courts should consider, among other things, when the action took place, where it took place, whether it was foreseeable, the purpose of the action, whether it served the principal, and the extent of the departure from normal methods or results. *Id.; see also, Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir.1987) (finding that supervisor acted "within scope of employment" in harassing subordinate where harassment took place at the office, during working hours and was carried out by someone with the authority to hire, fire, promote and discipline the plaintiffs); *Kauffman v.*

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7. *See e.g. Andrade v. Mayfair Manag., Inc.*, 88 F.3d 258, 261 (4th Cir.1996) (stating that "illegal sexual harassment is an illegitimate corporate activity, beyond the scope of supervisors' employment").

Allied Signal, Inc., 970 F.2d 178 (6th Cir.) (explaining that a relevant factor in determining if supervisor was acting "within the scope of employment" in harassing subordinate is whether the supervisor had "significant input" into personnel decisions), *cert. denied*, 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992).

Indeed, I believe that hostile environment sexual harassment is analogous to the Restatement's well-known paradigm, which explains that "a chauffeur, driving on an errand for his master, who knowingly drives on the left-hand side of the street or exceeds the speed limit, is still acting within the scope of employment." Restatement § 231 cmt. a. The act of speeding has not been authorized by the employer, but the journey has clearly been undertaken within the scope of the chauffeur's employment. Likewise, a pervasively hostile work environment of sexual harassment is never (one would hope) authorized, but the supervisor is clearly charged with maintaining a productive, safe work environment. The supervisor directs and controls the conduct of the employees, and the manner of doing so may inure to the employer's benefit or detriment, including subjecting the employer to Title VII liability. In hostile environment sexual harassment cases the supervisor, though not authorized to create a sexually hostile environment, uses his authority "to call [the victim] into his presence, to retain her in his presence over her objections, to use his responsibility to act as the voice of the employer to place her in a compromising position, and to take liberties with her personal privacy beyond the reach of a co-equal acquaintance, or a stranger." *See* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed By Their Supervisors*, 81 Cornell L.Rev. 66, 88 (1995); *see also, Huddleston*, 845 F.2d at 904

(employer liable where supervisor required plaintiff to attend staff meetings where she was harassed, and he physically touched her while berating her for her job performance); *Tomka v. The Seiler Corp.*, 66 F.3d 1295 (2d Cir.1995) (employer liable where supervisor required plaintiff to attend business dinner and encouraged alcohol consumption which led to her rape by supervisor and other employees).

Moreover, "[a]n act may be within the scope of employment although consciously criminal or tortious." Restatement § 231; *see also, Lyon v. Carey*, 533 F.2d 649 (D.C.Cir.1976) (employer liable where delivery person raped a woman to whom he was delivering furniture); *Ira S. Bushey & Sons. Inc.v. United States*, 398 F.2d 167 (2d Cir.1968) (government liable where drunken sailor's unauthorized acts caused ship to sink); *Carr v. Wm. C. Crowell Co.*, 28 Cal.2d 652, 171 P.2d 5 (1946) (employer liable where carpenter hit another employee in the head with a hammer); *Samuels v. Southern Baptist Hospital*, 594 So.2d 571 (La.Ct.App.1992) (hospital liable where nurse's assistant raped a patient).

Notwithstanding these well-established principles, the majority writes that an act is not within the scope of employment where "the agent has no intention to perform any service for his employer, but instead seeks only to further some personal end." Majority Op. at 1536. In support of this proposition, the majority cites *Bennett v. United States*, 102 F.3d 486 (11th Cir.1996) which involved an off-duty soldier who accidentally shot a civilian with a privately owned handgun while socially visiting another soldier in the Army barracks. *Id.* at 487. This Court stated that the soldier's activities on the evening of the shooting "were unrelated to any employment relationship with the military, and were not

undertaken to further his employer's business." *Id.* at 494. This conclusion, however, rested on facts very different from those before us. In *Bennett,* there was no dispute that the soldier was off-duty, and was visiting the barracks "for purely personal reasons unrelated to his responsibilities as a soldier," which failed "to bear even the faintest connection with his duties as an employee of the United States Army." *Id.* at 490. Terry's and Silverman's harassment took place during work hours and at the work place. Most importantly, the soldier in *Bennett* was not performing **any** act on behalf of his employer when the shooting occurred, nor were his activities surrounding the shooting of "the same general nature as" or "incidental to" any authorized conduct. In the case before us, however, Terry and Silverman were charged with creating and maintaining a productive, safe work environment, while directing their employees in the performance of their duties. It is while they were engaged in their responsibilities that the harassment of Faragher occurred and, thus, was clearly "incidental to" authorized conduct.

The majority's use of *Spencer v. Assurance Co. of America,* 39 F.3d 1146 (11th Cir.1994), is also inapposite. In *Spencer* this Court found that an employee, hired for road-paving, was not acting within the scope of employment when he committed an intentional battery while fighting "to protect his sister." There was nothing in the fight relating to the employee's work or the manner in which he was instructed to perform it. Indeed, the Court specifically recognized that"this case lacks a sufficient nexus between the employee's job and his battery of another to raise even a jury question as to the scope of employment issue." *Id.* at 1149. The Court explicitly recognized that

> "under special circumstances, an employee's intentional battery of another may be said to have occurred within the employee's scope of employment." See, e.g., *Forster v. Red Top Sedan Service, Inc.,* 257 So.2d 95 (Fla. 3d DCA 1972) (directed verdict in favor of employer reversed where employee bus driver forced plaintiff's car off the road and then assaulted and battered the car's occupants after plaintiff allegedly delayed the employee from performing his job-related duties); *Columbia by the Sea, Inc. v. Petty,* 157 So.2d 190 (Fla. 2d DCA 1963) (jury question created as to the scope of employment question when maitre d' struck a customer after customer failed to pay his bill and called maitre d' a "bastard").

The majority also cites to Restatement §§ 235 and 236, arguing that in order to hold the employer liable, the employee must have intended to "serve the interests" of the employer. However, this is too narrow a reading of these sections, as under those provisions, an employer can also be held liable if there was an intent "to perform it as a part of or incident to a service on account of which he is employed." Applying all of the foregoing principles to the facts of this case, I believe the City of Boca Raton is liable under § 219(1) for the hostile environment created by Terry and Silverman.

Alternatively, I believe the City is liable in this case under § 219(2)(d), which holds a principal liable for the acts of an agent when the agent is aided in accomplishing the tort by the existence of the agency relationship. *See* Restatement § 219(2)(d). As with analysis under § 219(1), proper application of § 219(2)(d) requires courts to closely scrutinize the power structure within the workplace to determine the extent to which the particular agency

relationship has empowered the supervisor to use or abuse his position to accomplish the harassment. *See Vance,* 863 F.2d at 1515 (degree of authority and overall structure of the workplace are relevant to agency analysis); *Sparks v. Pilot Freight Carriers, Inc.,* 830 F.2d 1554, 1559 (11th Cir.1987) (adopting E.E.O.C. reasoning that employer's delegation of authority empowered supervisor to act). *See generally,* Oppenheimer, 81 Cornell L.Rev. at 89.

The record reveals that both Terry and Silverman were granted virtually unchecked authority over the work environment. In Terry's capacity as Marine Safety Chief, "[he] had the authority to supervise all aspects of the lifeguards' work assignments, to conduct counseling and oral reprimands and place reports of such disciplinary actions in the lifeguards' personnel files." Terry also interviewed and selected new lifeguards, subject to approval by higher management. Moreover, Terry held the highest management position in the Marine Safety Section and on the City's beaches. Thus, he was ultimately responsible for the general beach environment, including the public's safety, and as such, it was incumbent upon him to ensure optimal performance from the lifeguards. Silverman, as Marine Safety lieutenant, and then captain, supervised the "lifeguards' daily duties, including designation of the lifeguards' work assignments and staffing of shifts, and supervision of their physical fitness routines."

With respect to the City's involvement with the lifeguards, the court found that "the lifeguards' contacts with higher city officials ... were almost non-existent," and the City admits that, "Marine Safety headquarters was located at the City beach and was thus physically remote from City Hall." The lifeguards operated under an

extensive chain of command, with at least six levels of management between the lifeguards and the City Manager. Most importantly, although the City had a written sexual harassment policy, that policy was never disseminated among Marine Safety Section employees, and in fact, supervisors were never told or made aware of the City's sexual harassment policy. Indeed, the district court explicitly found that any procedures that the City had in place to deal with sexual harassment were ineffectual because of the City's failure to disseminate those procedures.

In sum, Faragher was completely isolated from the City's higher management, and Terry and Silverman directly controlled and supervised all aspects of her day-to-day activities. Furthermore, it is clear that the City had divested itself of all responsibility for the social climate of the lifeguards' work environment, that Terry and Silverman essentially were given unfettered responsibility for and control over that environment, and that the lifeguards had no effective avenue of redress with the City. Thus, under *Vance,* Terry and Silverman were acting with the requisite amount of authority as agents to bind the City as principal. This conclusion is supported by the fact that the acts of harassment were undertaken during the time and at the place of work and were "incidental to" the broad range of tasks the supervisors were authorized to do, *see* Restatement § 229 (defining scope of employment), as well as by the fact that Terry and Silverman were aided in accomplishing these acts by the existence of the agency relationship.

For the foregoing reasons, I would hold the City liable for Terry's and Silverman's creation of a hostile work environment of sexual harassment.

TJOFLAT, Circuit Judge, concurring in part and dissenting in part:

With the exception of appellant Beth Ann Faragher's Title VII claim, I concur in the court's disposition of this case. As for that claim, I cannot join the court's opinion because I agree with the district court that Faragher's proof demonstrated that the City of Boca Raton violated Title VII by requiring her to work in a hostile environment. The court accepts as not clearly erroneous the district court's finding that hostility in the form of abusive sexual harassment was a condition of Faragher's employment, but it holds that the City is not liable under Title VII because the City had no "actual knowledge" of the sexual harassment and "there was no basis for imputing knowledge [of it] to the City." Ante at 1540.[1] I disagree. Faragher's supervisor, Bill Terry, had

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1. I am confused by the court's use of the conjunction "and." To me, because the City is a corporation and must act through its agents, actual knowledge must be imputed knowledge. That is, information that an agent obtains in discharging his or her duties is imputed by operation of law to the corporation, thus giving the corporation actual knowledge of what the agent learned. Hence, when referring to a corporation, imputed knowledge is actual knowledge.

I am also confused by the court's conclusion that the City would be liable if it "knew or should have known" of the sexual harassment in question. This implies that the City could be held liable for simple negligence. A Title VII claimant, however, must establish that the employer *intended* the harassment. I believe that the court, in using this "knew or should have known" language, means that if a trier of fact could conclude from the evidence that the agent responsible for ensuring order in the workplace (including the prevention of severe and pervasive sexual harassment) knew that an employee was being subjected to a hostile environment, that knowledge would constitute the employer's knowledge.

knowledge of the harassment because he perpetrated the harassment. The City should be held liable for the sexual harassment Faragher experienced because it placed Terry in charge of Faragher's working environment and gave him the responsibility of maintaining order in the workplace.

I.

A.

Title VII of the Civil Rights Act of 1964, as amended, provides that

> [i]t shall be an unlawful employment practice for an employer–
>
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

Title VII prohibits as a discriminatory condition of employment the employer's creation of an abusive working environment characterized by severe and pervasive sexual harassment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986). "A discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris v. Forklift Systems*, 510 U.S. 17, 22, 114 S.Ct. 367, 370-71, 126 L.Ed.2d 295 (1993). "[D]iscriminatory

conduct ... so severe or pervasive that it create[s] a work environment abusive to employees because of their ... gender ... offends Title VII's broad rule of workplace equality." *Id.*, 510 U.S. at 22, 114 S.Ct. at 371.

For obvious reasons, most employers strive to maintain order in the workplace. Order enhances efficiency. For employers in the private sector, order enhances the potential for profit. For public employers, order enhances the image of officials who must stand for re-election and bureaucrats who report to them and seek job security. Disorder, the converse of order, prevents the workplace from operating at optimal efficiency. Sexual harassment that is severe and pervasive constitutes disorder. Hence, employers have an extra-legal incentive to prevent it. Title VII, because of the liability and associated costs it may impose, provides employers with an added, legal incentive to prevent this form of disorder.

There is always someone in charge of any workplace. Depending on the character of the business or the number of employees in the workplace, the designation of the person in charge may be explicit. Alternatively, the designation may be tacit. Unless the employer designates someone other than the person in charge of the workplace as the one responsible for maintaining order, I would hold that the person in charge of the workplace has the responsibility of preventing severe and pervasive sexual harassment.[2] I would hold

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2. This approach is consistent with the Supreme Court's directive in *Meritor* that, in determining which of the employer's agents or employees is responsible for preventing severe and pervasive harassment from permeating the workplace, "courts [must] look to agency principles for guidance," although "such common law principles may not be transferable in all their particulars to Title VII." 477 U.S. at 72, 106 S.Ct. at 2408. Title VII, as interpreted in *Meritor*, requires employers to take steps to ensure that sexual harassment does not permeate the workplace. To the extent that the application of common law agency principles frustrates Title VII's goal of eliminating such harassment–by effectively relieving the employer of the responsibility of pursuing that goal–those principles must yield. The court, however, in reaching today's decision, does not appear to have considered this point.

further that if the employer delegates to someone else the duty of policing the workplace for sexual harassment, the employer must make the designation unambiguously known to those laboring in the workplace; otherwise the designation would have no legal, or practical, effect.

B.

In the case at hand, the court does not dispute that Terry was in charge of the workplace. As Chief of the Marine Safety Section, "Terry had the authority to supervise all aspects of the lifeguards' work assignments; to give oral reprimands and place reports of disciplinary actions in personnel files; and to interview and select new lifeguards, subject to approval by higher management." Ante at 1533. The district court found that the City "had a written sexual harassment policy, [but failed] to disseminate said policy among Marine Safety Section employees," including Faragher. *Faragher v. City of Boca Raton*, 864 F.Supp 1552, 1560 (S.D. Fla. 1994). Because the City neither communicated the policy to these employees nor identified the person to whom complaints of sexual harassment were to be made, the responsibility for implementing the policy in Faragher's workplace necessarily fell to Terry.[3] Because he was aware that

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3. The court implies that someone in the Parks and Recreation Department management was responsible for implementing the City's policy against sexual harassment by

Faragher was working in a sexually abusive environment and did nothing to correct the situation, I would hold the City liable for the injury she sustained.

II.

As noted above, the City had a policy against sexual harassment in the workplace. The City, however, did not communicate the policy to the employees of the Marine Safety Section or identify the person to whom complaints of sexual harassment were to be made. Thus, the City effectively concealed from those employees the avenue for redress of grievances. This concealment troubles me for three reasons. First, I fear that the court's opinion dilutes the employer's duty under Title VII to maintain a workplace free of severe and pervasive sexual harassment. Second, the court's opinion places an undue burden on employees who wish to complain of harassment in the workplace. Third, the court's opinion has the potential to breed disrespect for the law.

A.

The court exonerates the City from liability because Faragher did not complain to someone in the Parks and

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observing that "neither Faragher nor [fellow lifeguard Nancy] Ewanchew complained to Parks and Recreation Department management about" the harassing conduct in question. Ante at 1533. By suggesting that Faragher had to find someone in the management of that department with whom to lodge her complaint, the court ignores the reality of Faragher's workplace. The Parks and Recreation Department management was located elsewhere and had little, if any, contact with the Marie Safety Section's employees, while Terry was close at hand and was "in charge" of virtually every aspect of Faragher's work environment.

Recreation Department management. The court does so even though Faragher had not been told to whom she should complain. An employer reading the court's opinion may conclude that it, like the City of Boca Raton, can escape Title VII liability by having a policy against sexual harassment but concealing from its employees the identity of the person to whom claims are to be made. Because such concealment would have the potential for reducing claims of sexual harassment, and thus the cost of doing business, an employer might choose to follow the City's footsteps. The employer's other alternative, of course, would be to identify the person to whom complaints are to be made and to have an efficient mechanism for investigating them and taking curative measures when necessary. No system is perfect, however. Thus, an employer with a model system in place cannot render itself immune from claims. In weighing the costs of the two alternatives, an employer may opt for the course the City took in this case. That course may yield more sexual harassment but less liability, and thereby dilute the employer's Title VII duty.

B.

To the extent that the court's opinion induces employers to conceal the identity of the person to whom complaints of sexual harassment are made, the opinion places an undue burden on employees who suffer such harassment. Under my approach, if the employee is not informed of the identity of the person to whom complaints are to be made, the employee would simply turn to the person in charge of the workplace. Under the court's approach, the employee must guess to which of the employer's agents or employees a complaint should be lodged. Depending on the circumstances, this could be

risky business. Among other things, the employee might err in selecting the person to whom to complain, in which case her complaint could go for naught.[4] Faced with this uncertainty of outcome, the employee might forego complaining and either suffer the harassment or terminate her employment.

C.

The scenarios depicted in subparts A and B above, which I submit are entirely plausible, will in time breed disrespect for the law. Although I am sure that the court does not intend such a result, I contend that the result is likely. For employers, escaping Title VII liability for sexual harassment in the workplace will be seen as a game–a game to be played with cards dealt from a deck composed of law of agency principles. The object of the game is to escape Title VII liability without affording employees the protection that Title VII purports to provide. For employees, Title VII will be seen as an empty promise–a mere sop, if you will–enacted by Congress to placate a constituency.

ANDERSON, Circuit Judge, concurring in part and dissenting in part:

With respect to Faragher's Title VII sexual harassment claim against the City, I agree with Judge Barkett that the district court should be affirmed. I agree

4. Lodging a complaint imposes on the employee certain costs, including embarrassment and disruption of working relationships. Where the employee does not know to whom to complain, it may be that she will complain to the wrong person and that her complaint will not be addressed properly. Where the employee faces the costs associated with lodging a complaint and

with much of what is said in Judge Barkett's opinion. I agree with Judge Barkett that the City was appropriately found liable pursuant to the theory of "direct liability." In addition to the facts pointed out by Judge Barkett relating to the severity and pervasiveness of the conduct constituting a hostile environment, I would rely upon the testimony regarding the intermediate supervisor, Gordon. When plaintiffs complained to him, he indicated that the City did not care. I think this evidence of the City's lack of concern also supports the district court's finding of constructive notice.

I also agree with Judge Barkett that the City could be liable under a theory of "indirect liability," i.e., pursuant to the agency principles upon which our previous hostile environment cases have relied. I need not decide the threshold level of authority which a supervisor must possess in order to impose liability on the employer under these principles. For example, I need not decide that every supervisor with some authority relating to personnel can impose liability on the employer. It is sufficient for the disposition of this case, in my judgment, that Terry was endowed by the City with sufficient authority to impose liability on the City. The City placed Terry in charge of this particular workplace and in charge of the plaintiffs and similarly situated employees. The following facts support the conclusion that Terry was endowed with "virtually unchecked authority over the work environment."[1] The City left Terry wholly unsupervised with respect to Terry's management of the

sees little likelihood that her complaint will yield any benefit, the employee would probably not complain.

1. Judge Barkett at 1543 (M/S at 10).

workplace including the setting of its environment; the City gave Terry no effective instructions with respect to its sexual harassment policy or any other policy related to the work environment; and the City did not disseminate its policy against sexual harassment to plaintiffs or similarly situated employees. Having thus endowed Terry with complete authority to set the workplace environment, I have no difficulty concluding that Terry's conduct in determining the nature of the work environment was within the scope of his authority, or at least that he was aided in the actions he took by the agency relationship. [2]

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2. I need not decide whether the foregoing facts support agency liability under the scope-of-employment prong or under the aided-in-accomplishing-the-tort-by-the-agency-relationship prong or both. As suggested by Judge Barkett's analysis, I suspect the analysis is similar under either prong.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED FEBRUARY 8, 1996

United States Court of Appeals,

Eleventh Circuit.

No. 94-4878.

Beth Ann FARAGHER, Nancy Ewanchew,
Plaintiffs-Appellants-Cross-Appellees,

v.

CITY OF BOCA RATON, a political subdivision of the State of Florida, Defendant-Appellee-Cross-Appellant,
Bill Terry, David Silverman, Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida. (No. 92-8010-CIV-SH), Shelby Highsmith, District Judge.

Before COX, Circuit Judge, DYER, Senior Circuit Judge, and GOETTEL*, Senior District Judge.

COX, Circuit Judge:

In this case we must decide several important questions regarding hostile work environment sexual harassment under Title VII.

I. FACTS[1]

Beth Ann Faragher and Nancy Ewanchew worked as ocean lifeguards for defendant City of Boca Raton, Florida (the "City"), in the Parks and Recreation Department's Marine Safety Section. Only four to six of the forty to fifty lifeguards were female. The Marine Safety Headquarters was a small, one- story building with limited facilities, and all of the lifeguards shared the same locker room and shower. The tight quarters and high male-female ratio apparently led to a rambunctious atmosphere among the lifeguards.

During the relevant time frame, defendants Bill Terry and David Silverman acted as supervisors of the ocean lifeguards, Terry as Chief of the Marine Safety Section and Silverman as a Marine Safety lieutenant and then captain. Terry had the authority to supervise all aspects of the lifeguards' work assignments; to give oral reprimands and place reports of disciplinary actions in personnel files; and to interview and select new lifeguards, subject to approval by higher management. Silverman had supervisory authority over the lifeguards' daily duties, including designating work assignments and supervising physical fitness routines.

The Marine Safety Section was organized according to a clear chain of command. Lifeguards reported to Marine Safety lieutenants, and above them to captains; the captains reported directly to the Chief of the Marine Safety Section, who was directly supervised by the

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1 The facts are essentially drawn from the district court's Findings of Fact.

Recreation Superintendent; the Recreation Superintendent reported to the Director of Parks and Recreation, who reported to the City Manager. Lifeguards had almost no contact with City officials such as the Recreation Superintendent. Marine Safety Headquarters was in a remote location, far away from City Hall.

Marine Safety Chief Terry subjected both Faragher and Ewanchew to uninvited and offensive touching, and Ewanchew to offensive language as well. For example, Terry would put his arm around Faragher and rest his hand on her buttock. In a particularly egregious example of Terry's touching, Terry pressed himself against Ewanchew's buttocks and simulated sexual movement while the two were at the water fountain. Other female lifeguards similarly were subjected to Terry's uninvited and offensive touching and to his demeaning and offensive comments.

Lieutenant Silverman made offensive comments and gestures to both Faragher and Ewanchew. For example, in the presence of both Faragher and Ewanchew, as well as other lifeguards, Silverman engaged in a pantomime depicting cunnilingus. Examples of Silverman's offensive comments include saying to Faragher, after tackling her, "If you had tits I would do you in a minute," and to Ewanchew, "There are a lot of tits on the beach today." Silverman also made offensive remarks to other female lifeguards.

Neither Ewanchew nor Faragher complained to Parks and Recreation Department management about Terry's and Silverman's conduct while they were employed with the City or when they resigned. However, they both spoke about Terry's and Silverman's conduct with one of their supervisors, Marine Safety Lieutenant

and Training Captain Robert Gordon. In fact, most of the female lifeguards complained to Gordon about Silverman's language and conduct. The lifeguards did not speak with Gordon on a subordinate to superior basis; they spoke with him because they held him in high repute. Gordon did not report the complaints to his supervisor, Terry, or to any other City official.

Ewanchew resigned from her position with the City in April of 1989, saying that she was leaving because she had found a better job. At some time after her resignation, Ewanchew visited Terry and requested re-employment on a part-time basis. She was not re-employed. Faragher resigned in June of 1990 to attend law school. Her decision to leave was unrelated to the alleged sexual harassment. She did not discourage her sister from applying for a lifeguard position with the City. In April of 1990, Ewanchew wrote a letter to the City's Director of Personnel complaining that she and other female lifeguards had been sexually harassed by Terry and Silverman while she was employed by the City. The City did not know of Terry's and Silverman's conduct until receiving Ewanchew's letter. The City then investigated Ewanchew's complaint, determining that Terry and Silverman had engaged in some inappropriate conduct. The City reprimanded and disciplined them both.

II. PROCEDURAL BACKGROUND

In 1992, Faragher and Ewanchew sued the City, Terry, and Silverman. Faragher sued the City for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Count I). Faragher and Ewanchew each sued Terry and Silverman for sexual harassment under 42 U.S.C. § 1983 (Counts II and III). Faragher and Ewanchew also asserted pendent state law

claims. Faragher and Ewanchew each sued Terry for battery (Counts IV and V) and the City for negligent retention and supervision of Terry (Counts VI and VII). The district court held a non-jury trial on all claims.

The district court entered judgment for Faragher on her Title VII claim against the City, awarding her $1 in nominal damages. The court held that Terry's and Silverman's offensive conduct was sufficiently severe and pervasive to alter the conditions of Faragher's employment by creating a hostile work environment. The court held that the City was directly liable for Terry's and Silverman's conduct under agency principles based on Terry's and Silverman's supervisory authority and the overall workplace structure. In addition, the court held that the City was indirectly liable for Terry's and Silverman's offensive conduct because the court's finding that the conduct was severe and pervasive "supports an inference of knowledge, or constructive knowledge, on the part of the City regarding Terry's and Silverman's sexual harassment."

The district court entered judgment for Faragher on her § 1983 claim against Terry and Silverman. Noting that the Eleventh Circuit has not recognized a § 1983 cause of action for sexual harassment, the court held that such a cause of action is cognizable based on the weight of authority from other circuits.[2] The court found that Terry and Silverman acted under color of state law based on

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[2] Neither Terry nor Silverman contends on appeal that sexual harassment is not cognizable under § 1983. The district court held that a sexual harassment claim under § 1983 has two elements: (1) sexual harassment, and (2) intent to harass based on membership in a particular class. The court held that the harassment prong is satisfied by showing actionable sexual harassment under Title VII.

their supervisory authority. The court found that Faragher had proved her § 1983 claim by showing actionable sexual harassment under Title VII and intent to harass based on membership in a particular class, i.e., females. The court rejected Terry's qualified immunity defense. The court awarded Faragher $10,000 in compensatory damages against Terry and Silverman, jointly and severally.

The district court entered judgment for Terry and Silverman on Ewanchew's § 1983 claim. The court held that Ewanchew did not prove her § 1983 claim because she failed to show actionable sexual harassment under Title VII.[3] Specifically, the court found that Ewanchew's request for re-employment after resigning "makes it illogical to find a perception of hostility in the work environment on her part." In addition, the court found that Ewanchew's testimony that Terry's and Silverman's conduct was intolerable at the time was not credible. The court held that Ewanchew therefore had not satisfied the requirement that an employee subjectively perceive the work environment to be abusive. *See Harris v. Forklift Systems, Inc.*, —U.S.—, —, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993).

The court entered judgment for Faragher on her battery claim against Terry and for Ewanchew on her battery claim against Terry. The court awarded Ewanchew $35,000 in compensatory damages and $2,000 in punitive damages. Faragher was awarded $500 in punitive damages.

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[3] As explained in note 2, the district court held that one element of a § 1983 sexual harassment claim is showing harassment under Title VII.

The court entered judgment for the City on both Faragher's and Ewanchew's negligent retention claims. The court held that its finding that the City had constructive notice of Terry's and Silverman's conduct for purposes of Title VII liability did not mean that the City had constructive notice of Terry's conduct for purposes of negligent retention liability. Applying to the City the reasonable employer standard, the court found insufficient proof that the City should have known of Terry's conduct before Ewanchew's letter.

Faragher and Ewanchew appeal. The City cross-appeals.

III. ISSUES ON APPEAL

The issues presented on appeal are: (1) whether, to recover under Title VII for hostile environment sexual harassment, an employee must subjectively perceive the work environment to be abusive at the time that she is employed; (2) whether the district court erred in relying on conduct of which Faragher was unaware in determining that Terry's and Silverman's conduct was sufficiently severe or pervasive to alter the conditions of her employment in violation of Title VII; (3) whether the district court erred in finding that Faragher was subjected to an abusive work environment and perceived the environment to be abusive; (4) whether, under Title VII, the City may be directly liable for Terry's and Silverman's hostile environment harassment of Faragher, regardless of its actual or constructive knowledge of that harassment; (5) whether, under Title VII, the district court erred in finding that the City had constructive knowledge of Terry's and Silverman's conduct based on its pervasiveness; and (6) whether, under Florida law, the district court erred in finding that the City had no

constructive knowledge of Terry's unfitness for purposes of the negligent retention claims.

We are not presented with any challenge to the district court's judgment for Faragher on her § 1983 claim against Terry and Silverman. Nor are we presented with a challenge to the district court's judgment for Faragher and Ewanchew on their battery claims against Terry.

IV. STANDARDS OF REVIEW

We review the district court's findings of fact under the clearly erroneous standard of review. *Pullman-Standard v. Swint,* 456 U.S. 273, 287-88, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). The question of actual or constructive knowledge is an issue of fact reviewed for clear error. *Reich v. Department of Conservation and Natural Resources, State of Ala.,* 28 F.3d 1076, 1082 (11th Cir. 1994). We review the district court's conclusions of law and its application of law to facts *de novo. Massaro v. Mainlands Section 1 & 2 Civic Assn., Inc.,* 3 F.3d 1472, 1475 (11th Cir. 1993), *cert. denied,* —U.S.—, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994).

V. DISCUSSION

B. *Ewanchew's Subjective Perception That Work Environment Was Abusive Under Harris.*

Ewanchew contends that the district court erred in holding that she did not satisfy the subjective prong of the hostile environment test in *Harris v. Forklift Systems,* —U.S.—, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Under *Harris,* Title VII is not violated unless the victim of harassment subjectively perceives the work environment to be abusive, because otherwise the harassment has not

altered the conditions of the victim's employment. *Harris,* —U.S. at —, 114 S.Ct. at 370. The district court found that Ewanchew did not perceive her work environment to be abusive because her testimony to that effect was not credible and because she asked Terry to re-employ her at some time after she resigned.

Ewanchew approaches the district court's holding that she did not satisfy *Harris* from two different angles. First, she argues that the district court's factual finding that she did not perceive her work environment to be abusive is inconsistent with its finding that she suffered $35,000 in damages on her battery claim. According to Ewanchew, the $35,000 damages finding is correct and leads ineluctably to the conclusion that she perceived her work environment to be abusive. Ewanchew's second tack is to contend that the district court erroneously engrafted onto *Harris'* subjective prong a requirement for present-sense revulsion. *Harris* 's subjective prong is satisfied, she argues, by after-the-fact realization of the offensiveness of the perpetrator's conduct. Terry responds to both of Ewanchew's arguments by contending that the district court's finding is not clearly erroneous.

Ewanchew has not demonstrated that the district court's factual findings are inconsistent. On Ewanchew's battery claim, the court found that Terry's offensive touching caused Ewanchew $35,000 in damages for psychological or emotional injury. A finding of damages resulting from an offensive touching—even if the touching, when combined with other conduct, constitutes sexual harassment—does not necessarily mean that the victim of the touching perceived her *work environment* to be abusive. Although the district court makes no specific finding as to when Ewanchew suffered damages, Ewanchew's damages from the battery seem to have

occurred some time after she resigned from her lifeguard position with the City. In Ewanchew's Reply Brief and at oral argument, Ewanchew's counsel conceded that Ewanchew suffered a delayed reaction to the offensive conduct, but argued that Ewanchew's delayed reaction satisfies *Harris*. Notably, Ewanchew has pointed to no evidence in the record indicating that she suffered damages from the battery before she resigned.

Under this view of the battery damages award, the district court's findings are not inconsistent. The district court reasonably could have found that Ewanchew did not view her work environment as abusive but, after resigning, suffered emotional or psychological trauma from the offensive touchings. Thus, it is not inconsistent, under this view of the facts, to award damages on Ewanchew's battery claim while finding that Ewanchew did not satisfy *Harris*, at least as the district court read *Harris*.

Nor is the district court's finding that Ewanchew did not perceive her work environment to be abusive clearly erroneous. The district court found "not credible [Ewanchew's] present assertion that she found [Terry's and Silverman's] conduct intolerable, *then*." Furthermore, the court found that Ewanchew "appears to have tolerated such conduct not because she felt she had to but because it wasn't that important to her." In addition to these findings based on the credibility of Ewanchew's testimony, the court determined that it would be illogical to find a perception of hostility on Ewanchew's part in light of her request for a part-time job after she left the City's employ.

Ewanchew contends that, even if she did not perceive her work environment to be abusive at the time,

she satisfied *Harris* 's subjective prong so long as she felt offended or abused after the fact. The parties have not pointed us to any federal case addressing after-the-fact perceptions of abuse under *Harris*.[4] According to Ewanchew, the subjective prong's *raison d'etre* is satisfied by after-the-fact realization of the offensiveness of the perpetrator's conduct. The subjective prong, she argues, ensures that the alleged conduct injured this particular plaintiff. We cannot agree that this is the subjective prong's only purpose.

Harris 's subjective prong ensures that the alleged conduct altered the conditions of the plaintiff's employment. *See Harris*, —U.S. at —, 114 S.Ct. at 370. Otherwise, Title VII is not implicated. Title VII makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e-2(a)(1). Sexual harassment constitutes discrimination based on sex but is actionable under Title VII only if it alters the terms or conditions of the victim's employment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986). Hence *Harris* 's subjective prong: "if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Harris*, —U.S. at —, 114 S.Ct. at 370.

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[4] Ewanchew cites two cases from other circuits interpreting *Harris*'s subjective prong but neither addresses after-the-fact perceptions of abuse. *See Dey v. Colt Construction & Development Co.*, 28 F.3d 1446 (7th Cir. 1994); *King v. Hillen*, 21 F.3d 1572 (Fed. Cir. 1994).

Under *Harris,* then, Title VII is not violated when the victim of harassment does not perceive her work environment to be abusive at the time that she is employed. *But cf. Kimzey v. Wal-Mart Stores, Inc.,* 907 F.Supp. 1309 (W.D.Mo.1995) (interpreting *Harris* as not requiring well-defined, subjective belief of hostility at exact moment an incident occurs). An employee's conditions of employment are not affected by what happens after she resigns. After-the-fact realization of the offensiveness of conduct thus does not satisfy *Harris;* it is irrelevant to whether the employee's conditions of employment were altered. Thus, contrary to Ewanchew's contention, the district court did not err in requiring Ewanchew to prove that she perceived her work environment to be abusive during the term of her employment. Because she did not perceive her environment to be abusive, Terry's and Silverman's conduct did not alter the conditions of her employment and, therefore, she cannot recover for their conduct under Title VII.

C. *Whether Terry's and Silverman's Conduct Was Sufficiently Severe and Pervasive To Alter Faragher's Conditions of Employment.*

On its cross- appeal, the City contends that the district court erred in relying on conduct of which Faragher was unaware in determining that Terry's and Silverman's conduct was so pervasive and severe as to alter Faragher's conditions of employment. Faragher does not contend that the district court properly relied on conduct of which Faragher was unaware.

The district court's opinion is somewhat ambiguous as to this issue, but parts of the opinion make it at least arguable that the district court relied on conduct

of which Faragher was unaware in determining that Terry's and Silverman's conduct was so pervasive and severe as to alter Faragher's conditions of employment. The district court erred to the extent that, in making this determination, it relied on conduct of which Faragher was unaware. *See Edwards v. Wallace Community College,* 49 F.3d 1517, 1522 (11th Cir. 1995); *see also Hirase-Doi v. U.S. West Communications, Inc.,* 61 F.3d 777, 782 (10th Cir. 1995). In a case of hostile environment sexual harassment, an employee's conditions of employment cannot be altered by conduct of which she is unaware. Moreover, conduct of which an employee is unaware cannot contribute to her subjective view of the work environment as hostile. *Edwards,* 49 F.3d at 1522; *Hirase-Doi,* 61 F.3d at 782.[5]

The City argues that, if the district court had considered only conduct of which Faragher was aware, it could not have found that Faragher was subjected to an abusive work environment. The City further contends that the district court erred in finding that Faragher subjectively perceived her work environment as hostile or abusive in light of her apparent nonchalance toward her environment, her failure to complain, and her failure to caution her sister about applying for a job as a lifeguard with the City. Faragher responds that the evidence supports the district court's findings that Terry's and Silverman's conduct, as known to Faragher, was sufficiently severe and pervasive to create an abusive work environment, and that Faragher subjectively perceived her environment as abusive.

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5 Of course, evidence of harassment of which Faragher was unaware may be relevant to the extent that it corroborates her allegations.

If, as the City argues, the district court indeed relied on conduct of which Faragher was unaware in determining that her work environment was abusive, the extent of the court's reliance on that conduct is unclear. However, that question need not detain us. We have no doubt that the district court would have found that Faragher's work environment was abusive, both objectively and subjectively, based solely on the conduct of which Faragher was aware. Indeed, the record suggests that it might have been clear error for the district court, having credited Faragher's testimony, to find otherwise.

In determining whether a work environment is abusive or hostile, the totality of the circumstances must be considered. Relevant circumstances include: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris,* —U.S. at —, 114 S.Ct. at 371. Our review of the record reveals that Faragher was subjected to frequent and severe discriminatory conduct by Terry and Silverman. While some of the conduct might be characterized as "mere offensive utterance," other conduct was physically threatening (for example, being tackled by Silverman) and humiliating (for example, Silverman's comments about Faragher's body, the terms he used to describe women, and his pantomime of oral sex). We need not catalogue all of the conduct to which Faragher was subjected, for we have no trouble concluding that Terry's and Silverman's conduct, as known to Faragher, was severe and pervasive enough to create an objectively abusive work environment.

We also conclude that the district court's finding that Faragher subjectively perceived her work

environment to be abusive is not clearly erroneous. The district court based its finding largely on the credibility of Faragher's testimony. The court considered Faragher's failure to complain or to caution her sister about applying for a lifeguard position, but concluded that other factors explained her actions. We cannot say that the district court clearly erred in its resolution of this issue.

D. *Direct Liability of City for Hostile Environment Sexual Harassment.*

The City also contends on its cross-appeal that the district court erred as a matter of law in holding the City directly liable for Terry's and Silverman's conduct under Title VII, without regard to whether the City had actual or constructive knowledge of the conduct. Citing *Steele v. Offshore Shipbuilding, Inc.,* 867 F.2d 1311 (11th Cir. 1989), the City argues that it may be liable under Title VII for hostile environment sexual harassment only indirectly through *respondeat superior;* that is, only if it knew or should have known of the sexual harassment and failed to take prompt remedial action. Faragher concedes that, under *Steele,* the City is not directly liable for Terry's and Silverman's conduct.

This is a pure hostile environment case. The district court acknowledged our admonition in *Steele* that holding employers strictly liable for a supervisor's sexual harassment is illogical in a pure hostile environment setting. The court expressly found that the City had no actual knowledge of Terry's and Silverman's sexual harassment before receipt of Ewanchew's letter. Nevertheless, relying on our decisions in *Huddleston* and *Vance,* the court held the City directly liable for Terry's and Silverman's conduct because it found that they were the City's agents. *See Vance v. Southern Bell Tel. & Tel.*

Co., 863 F.2d 1503, 1512 (11th Cir. 1989), *overruled on other grounds, Patterson v. McLean Credit Union,* 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988). It held that Faragher need not show either actual or constructive notice to the City, notwithstanding our statement in *Steele* that corporate liability exists in a pure hostile environment case only if the employer knew or should have known of the harassment. *Steele*, 867 F.2d at 1316.

The Supreme Court has declined to issue a definitive rule as to when a corporate defendant is liable for hostile environment sexual harassment under Title VII. *Meritor,* 477 U.S. at 72, 106 S.Ct. at 2408. From Congress's decision to define "employer" under Title VII to include the employer's agents, 42 U.S.C. § 2000e(b), however, the Court inferred that Congress intended for courts to look to common law agency principles in Title VII sexual harassment cases. *Meritor*, 477 U.S. at 72, 106 S.Ct. at 2408. This circuit has applied agency principles to the issue of corporate liability for sexual harassment on numerous occasions, including in *Steele, Vance,* and *Huddleston.*

Our cases establish the following rules. An employer is directly liable for sexual harassment when the harasser is acting as the employer's agent. *Steele,* 867 F.2d at 1316 n. 1; *Vance,* 863 F.2d at 1512; *Huddleston,* 830 F.2d at 904; *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558 (11th Cir. 1987). Thus, an employer is directly liable for sexual harassment by a supervisor or other employee acting within the scope of his employment. *See Sparks,* 830 F.2d at 1558 (citing Restatement (Second) of Agency § 219(1)). An employer also is directly liable, under agency principles, for sexual

harassment by a supervisor or other employee acting outside the scope of his employment if the supervisor or employee was aided in accomplishing the harassment by the existence of the agency relationship. *Id.* at 1559-60 (citing Restatement (Second) of Agency § 219(2)(d)).[6]

Applying these agency principles, we have held that an employer is strictly liable for *quid pro quo* sexual harassment. *Henson v. City of Dundee,* 682 F.2d 897, 909-910 (11th Cir. 1982). As we explained in *Steele,* a supervisor by definition acts as the company when engaging in *quid pro quo* harassment. *Steele,* 867 F.2d at 1316. The supervisor acts within the scope of his actual or apparent authority to hire, fire, discipline, or promote. Moreover, the supervisor uses the means furnished to him by the company to accomplish the harassment when using his apparent or actual authority to extort sexual consideration from the victim. *Id.* (quoting *Henson,* 682 F.2d at 910).

Whereas an employer is always directly liable for *quid pro quo* harassment, an employer rarely will be directly liable for hostile environment harassment; rather, liability will be *indirect.*[7] under agency principles, these seemingly disparate results make sense. A supervisor or other employee typically does not act as the company when he subjects an employee to a hostile work environment. Hence the distinction between liability for

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6 *Accord Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir.), cert. denied — U.S. —, 116 S.Ct. 569, 133 L.Ed.2d 493 (1995); *Hirase-Doi*, 61 F.3d 777, 783 (10th Cir. 1995); *Karibian v. Columbia University*, 14 F.3d 773, 780 (2nd Cir.), *cert. denied* — U.S. —, 114 S.Ct. 2693, 129 L.ed.2d 824 (1994); *Bouton v. BMW of North America*, 29 F.3d 103, 106 (3rd Cir. 1994).

7 We discuss indirect employer liability in section V.D.

quid pro quo harassment and liability for hostile environment harassment:

> Strict liability is illogical in a pure hostile environment setting. In a hostile environment case, no *quid pro quo* exists. The supervisor does not act as the company; the supervisor acts outside "the scope of actual or apparent authority to hire, fire, discipline, or promote." Corporate liability, therefore, exists only through *respondeat superior;* liability exists only where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor.
>
> *Id.*

With respect to employer liability for pure hostile environment harassment, *Steele* and *Vance* appear to conflict.[8] *Steele* precludes direct employer liability in a pure hostile environment case, allowing only indirect liability if the employer knew or should have known of the harassment and failed to take prompt remedial action. *Id.* *Vance,* on the other hand, allows direct employer liability in a hostile environment case if the harasser acted as the employer's agent. *Vance,* 863 F.2d at 1514-15.

The district court correctly reconciled this precedent in holding that an employer may be liable in a hostile environment case if either (1) the employer knew or should have known of the harassment and failed to take prompt remedial action, or (2) the harasser acted as the

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[8] *Steele* and *Vance*, decisions issued almost contemporaneously, were the first cases in which we addressed the standard for employer liability for pure hostile environment harassment. *See Steele*, 867 F.2d at 1317; *Vance*, 863 F.2d at 1515.

employer's agent. However, as we explain below, only in an exceptional case will a harasser act as the employer's agent in creating a hostile work environment. This is not such a case. The district court erred in holding that Terry and Silverman acted as the City's agents in harassing Faragher.

The district court found that Terry and Silverman were the City's agents based on their supervisory authority and the overall structure of the workplace. We agree that Terry and Silverman were the City's agents for some purposes. But the relevant inquiry is whether they were acting as the City's agents in subjecting Faragher to a hostile work environment. *See Sparks,* 830 F.2d at 1558-59 (analyzing not whether the harasser was an agent generally but whether harasser acted as an agent when he harassed victim). Faragher does not contend that Terry and Silverman were acting within the scope of their employment when they made offensive remarks and gestures and touched her. And we have found no record evidence suggesting that they were acting within the scope of their employment when they harassed Faragher.[9]

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[9] This case is thus distinguishable from *Huddleston*, on which the district court relied in part in holding the City directly liable. In Huddleston, the harasser berated the victim for her job performance in the course of creating a hostile work environment. *Huddleston*, 845 F.2d at 904. Thus, the harasser acted within his supervisory authority to hire, fire, discipline, or promote. *See Steele*, 867 F.2d at 1317 n.2. Here, however, there is no evidence that Terry or Silverman acted within their supervisory authority in creating a hostile work environment. Significantly, in *Huddleston*, the harasser's conduct constituted *quid pro quo* harassment as well as hostile environment harassment. *See id.* Thus, by definition, the harasser acted as the company. Here, though, only hostile environment sexual harassment is alleged.

The district court relied on *Vance* in finding that Terry and Silverman were the City's agents for direct liability purposes. Plaintiff in *Vance* sued her employer for racial discrimination under 42 U.S.C. § 1981; the legal elements of a harassment claim under § 1981 were the same as they are under Title VII. *Vance,* 863 F.2d at 1509 n.3. She alleged, *inter alia,* that she was subjected to a hostile work environment and discriminatorily disciplined because of her race. *Id.* at 1511. The district court correctly instructed the jury that the employer was liable if a supervisor acting within the scope of his employment, as an agent of the employer, harassed plaintiff. *Id.* at 1514 n.10. The jury returned a verdict for plaintiff, but the district court granted the employer's motion for judgment notwithstanding the verdict. The district court held, *inter alia,* that the employer could not be held liable because it had adequate grievance procedures and plaintiff had failed to give the employer notice of the harassment. *Id.* at 1512. We reversed, holding that the employer's grievance procedures did not, as a matter of law, insulate it from liability. *Id.* at 1514.

We also held that an employer may be directly liable for the existence of a hostile work environment. *Id.* at 1514-15.[10] Because plaintiff in *Vance* alleged that her supervisor was an agent of the employer for direct employer liability purposes, we examined whether the evidence was sufficient for the jury to find the employer

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[10] We cited *Huddleston* for the rule that when the harasser acts as an agent of the employer for purposes of Title VII, and thus the corporate employer is directly liable. *Id.* at 1514. As explained in note 9, the conduct in *Huddleston* constituted both hostile environment and *quid pro quo* harassment.

directly liable through its agent, plaintiff's supervisor.[11] *Id.* We held that a reasonable jury could conclude from the evidence that the supervisor was acting as the employer's agent in creating the hostile work environment. *Id.* at 1515.

In so holding, we listed several factors relevant to whether a harasser is acting as the employer's agent in creating a hostile work environment: the supervisor's direct authority over the plaintiff, the overall structure of the workplace, and the relative positions of the parties. *Id.* The district court examined these same factors in this case in determining that Terry and Silverman were the City's agents. However, further scrutiny of *Vance* reveals that, while those factors were directly relevant to the allegations in *Vance,* they are not dispositive here.

In *Vance,* we based our agency analysis largely on the agency analysis in *Hamilton v. Rodgers,* 791 F.2d 439 (5th Cir. 1986). *See Vance,* 863 F.2d at 1515. In *Hamilton,* the Fifth Circuit held that two intermediate level supervisors were agents of the fire department under Title VII because "[t]hey had authority over matters such as car assignments and the staffing of shifts, and they *wielded this authority to Hamilton's detriment.* Even more important, they filed the critical reports that led to Hamilton's 1982 suspension." *Hamilton,* 791 F.2d at 442 (emphasis added). The supervisors had denied Hamilton a car assignment, scheduled him for the night shift, and given him poor evaluations, all for racially discriminatory

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[11] Though we focused in our opinion on whether the jury could find that plaintiff's first supervisor, Wagner, acted as the employer's agent, the evidence also showed that other supervisors acted as employer's agents in discriminatorily disciplining plaintiff. *See id.* at 1507-08, 1511.

reasons. *Id.* Thus, the supervisors' authority over Hamilton and the structure of the workplace showed that the supervisors were acting within the scope of their employment in violating Title VII.[12]

Similarly, in *Vance,* plaintiff had presented evidence from which the properly instructed jury could infer that the supervisor was acting within the scope of his employment when he created the hostile work environment. The evidence suggested that the supervisor had hung a noose over plaintiff's work station. *Vance,* 863 F.2d at 1506. The supervisor testified that he had constructed a device which looked like a noose, but explained "that it had been designed to desheathe cable to increase productivity." *Id.* We held that a jury could conclude from this evidence that the supervisor acted as the employer's agent in creating the hostile environment. *Id.* at 1515. Viewed in light of *Hamilton,* it is evident that *Vance* 's focus on the supervisor's authority (to discipline employees, handle union grievance proceedings, and make personnel changes) and the overall structure of the workplace was aimed at determining whether the supervisor was acting within the scope of his employment when constructing the device ostensibly designed to increase productivity.[13]

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[12] *Hamilton* involved allegations of discrimination in addition to just the creation of a hostile work environment. The Fifth Circuit seems to have predicated the employer's liability on conduct of the supervisors that did not form part of the hostile environment allegations. *See id.* Thus, it is not at all clear that the supervisors' authority and the overall structure of the workplace were relevant to the fire department's liability for the hostile work environment.

[13] Plaintiff's claim was based on allegations of discriminatory discipline as well as the noose incident. *Id.* at 1511. Though we did

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Here, the district court mechanically applied the factors listed in *Vance* without determining their relevance to whether Terry and Silverman were acting within the scope of their employment in harassing Faragher. The harassment here consisted of offensive comments, gestures, and touching. If, for example, as in *Vance,* Terry and Silverman had constructed something offensive and intimidating to women under the guise of trying to improve lifeguard performance, then their supervisory and disciplinary authority would support a finding that they acted as the City's agents in violating Title VII. But Terry's and Silverman's supervisory and disciplinary authority does not support a finding that they were acting within the scope of their employment in subjecting Faragher to offensive language, gestures, and touching. Thus, the district court erred in holding the City directly liable for that conduct.

Vance demonstrates that *Steele* overstates the case in saying that, in a pure hostile environment setting, an employer may be liable *only* when the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action. An employer also may be directly liable if, as in *Vance,* the harasser acted as the employer's agent in creating the hostile work environment. Still, *Steele* accurately describes the rule for employer liability in the vast majority of hostile environment cases. *Vance* 's finding of direct employer

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not refer to the discriminatory discipline in finding that the jury reasonably could conclude that the employer was directly liable for its supervisors' conduct, the supervisors clearly were acting within the scope of their employment in taking disciplinary action against plaintiff. Thus, the employer would have been directly liable on that basis as well.

liability is unlikely to be replicated in pure hostile environment cases because the facts of that case were exceptional. Rarely will a supervisor or other employee act within the scope of his employment in creating a hostile work environment. In pure hostile work environment cases, therefore, *Steele* generally will govern employer liability.[14]

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[14] The only other possible ground for the City's direct liability would be that Terry and Silverman were aided in accomplishing the harassment by the existence of the agency relationship. *See Sparks*, 830 F.2d at 1559-60 (citing Restatement (Second) of Agency § 219(2)(d)). This basis for direct liability—like direct liability for acts within the scope of employment—typically occurs only in *quid pro quo* harassment cases. For example, in *Sparks*, the evidence showed that the harasser used the authority delegated to him by the company to assist him in the harassment; he repeatedly reminded the victim that he could fire her if she refused his advances. *Id.* at 1560. *See also Steele*, 867 F.2d at 1317 (limiting holding of *Sparks* to situations involving both *quid pro quo* and hostile environment harassment.) However, even in a hostile environment case, the existence of the agency relationship may aid in accomplishing the harassment. *See e.g., Gary v. Long*, 59 F.3d at 1397; *Kariban v. Columbia University*, 14 F.3d at 780. We therefore examine whether the district court's holding may be affirmed on this ground.

The evidence does not support a finding that Terry and Silverman were aided, within the meaning of the common law, in their harassment of Faragher by their agency relationship with the City. As the D.C. Circuit noted, a supervisor is always, in a sense, aided in accomplishing the tort by the existence of the agency because his responsibilities include close proximity to and regular contact with the victim. *Gary v. Long*, 59 F.3d at 1397. However, the common law rule does not use "aided" in such a broad sense. Rather, the employer is liable only if the harassment is accomplished by an instrumentality of the agency or through conduct associated with the agency status. *Id.* In *Vance*, for example, although the supervisor's conduct was egregiously

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D. *Indirect Liability of City for Hostile Environment Sexual Harassment.*

The district court found that the City had no actual knowledge of the sexual harassment but had constructive knowledge due to the harassment's pervasiveness. The City contends that the district court's finding that the City had constructive notice of the harassment is clearly erroneous and, therefore, that the City may not be held indirectly liable for the harassment. Faragher responds that the district court's finding that the sexual harassment was severe and pervasive enough to infer the City's knowledge is not clearly erroneous.

An employer is indirectly liable for hostile work environment sexual harassment if the employer knew or should have known of the harassment and failed to take prompt remedial action. *Steele*, 867 F.2d at 1316; *Vance*, 863 F.2d at 1512; *Henson*, 682 F.2d at 905.[15] A plaintiff can prove an employer's knowledge of harassment by showing that she complained to higher management. *Vance*, 863 F.2d at 1512; *Huddleston*, 845 F.2d at 904. The district court found that Faragher did not complain to higher management at the City. While several lifeguards

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offensive, it could be viewed as conduct associated with the agency status in that it was purportedly meant to increase productivity. Here, however, the offensive remarks, gestures, and touching cannot reasonably be viewed as conduct associated with Terry's and Silverman's status as agents of the City.

[15] Agency principles are the source of indirect employer liability as well as direct employer liability. If an employer knows or should know of sexual harassment and fails to remedy the situation, then the employer is liable for its own negligence. *See Hirase-Doi*, 61 F.3d at 783; *Bouton*, 29 F.3d at 106-07.

complained to Lieutenant Gordon, the district court found that he did not rank as higher management in the City and, therefore, that notice to him should not be imputed to the City.[16]

A plaintiff also can prove an employer's knowledge by showing that the harassment was pervasive enough to charge the employer with constructive knowledge. *Vance,* 863 F.2d at 1512; *Huddleston,* 845 F.2d at 904; *Henson,* 682 F.2d at 905. The district court believed that its finding that the conduct was sufficiently severe and pervasive to alter the conditions of Faragher's employment "supports an inference of knowledge, or constructive knowledge, on the part of the City regarding Terry's and Silverman's sexual harassment, making the City indirectly liable for such conduct." According to the court, the pervasiveness analysis applicable to finding that the work environment was abusive is the same as the analysis required to show the employer's knowledge.

We agree with the district court that the analyses are the same to the extent that a court must evaluate the totality of the circumstances both in determining whether the work environment was abusive and in determining whether the conduct was pervasive enough to put the employer on notice. *See Vance,* 863 F.2d at 1513. But we cannot agree with the district court's apparent belief that

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[16] In its discussion of the City's direct liability for Terry's and Silverman's conduct, however, the court held that Gordon's knowledge of Terry's and Silverman's conduct provides a basis for holding the city liable. This was error. For the City to be directly liable for Gordon's conduct, Gordon must have harassed Faragher while acting as the City's agent. However, Gordon did not harass Faragher; he knew about someone else's inappropriate conduct. And Gordon did not receive that information as the City's agent; he received it as someone held in high repute by his colleagues.

simply because conduct is pervasive enough to create an abusive work environment the employer should be charged with knowledge of the conduct. The question of notice to the employer is distinct from the question of the environment's abusiveness. Thus, the district court erred to the extent that it conflated the two inquiries.

The question of constructive knowledge is an issue of fact reviewed for clear error. *Reich,* 28 F.3d at 1082. There may be cases in which it is difficult to draw the line where conduct becomes so pervasive that the employer should have known about it. But this is not such a case. The district court expressly found that the City had no knowledge of Terry's and Silverman's conduct. Neither the district court nor Faragher has pointed to any factual basis for concluding that the City should have known of their conduct. The lifeguards were stationed at a remote location and had little contact with City officials. The district court clearly erred in finding that the City's knowledge may be inferred solely from the fact that the conduct was pervasive enough to create an abusive work environment.

E. *Constructive Knowledge of Terry's Unfitness Under Florida Negligent Retention Law.*

Finally, Faragher and Ewanchew contend that the district court erred in finding that, for purposes of their negligent supervision claims, the City did not have actual or constructive notice of Terry's conduct. Our review of the record leads us to agree with the City that the district court's finding that the City had no notice of Terry's conduct is not clearly erroneous.

VI. CONCLUSION

We reverse the district court's judgment for Faragher on her Title VII sexual harassment claim against the City. In all other respects, we affirm the district court's judgment.

AFFIRMED IN PART; REVERSED IN PART.

APPENDIX C - MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JULY 22, 1994

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)

No. 92-8010-Civ
(Shelby Highsmith)

Beth Ann FARAGHER, Nancy Ewanchew,

Plaintiffs,

v.

CITY OF BOCA RATON, a political subdivision of the State of Florida, Bill Terry, David Silverman,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In 1992, Plaintiffs Beth Ann Faragher & Nancy Ewanchew, former lifeguards for the City of Boca Raton, brought this sexual harassment action against the City and two City employees, Bill Terry and David Silverman. The following claims in the amended complaint came before the Court for non-jury trial on June 21, 1994:

Count I: Faragher's Title VII claim against the City.

Count II: Faragher's § 1983 claims against Terry & Silverman.

Count III: Ewanchew's § 1983 claims against Terry & Silverman.

Count IV: Faragher's battery claim against Terry.

Count V: Ewanchew's battery claim against Terry.

Count VI: Faragher's claim for negligent retention and supervision of Terry against the City.

Count VII: Ewanchew's claim for negligent retention and supervision of Terry against the City.

Having received documentary and testimonial evidence, having heard arguments of counsel, and being otherwise fully advised in the premises, the Court makes its findings of fact and publishes its conclusions of law.

FINDINGS OF FACT

A. The Marine Safety Section

1. Plaintiffs Beth Ann Faragher and Nancy Ewanchew are two females who formerly worked as ocean lifeguards in the Marine Safety Section of the Parks and Recreation Department for Defendant City of Boca Raton ("City").

2. The City employed Faragher on an intermittent basis from September, 1985, through June, 1990, and Ewanchew from April, 1987, through April, 1989.

3. Defendant Bill Terry was the Chief of the Marine Safety Section throughout the plaintiffs' tenure with the City. In December, 1990, however, Terry was transferred to the position of Aquatics Planner, which carries no supervisory authority.

4. Defendant David Silverman was hired by the City as an ocean lifeguard in January, 1980, was promoted to lieutenant in July, 1985, and to captain in June, 1989.

5. The reporting hierarchy within the Marine Safety Section during plaintiffs' employment was as follows: ocean lifeguards reported to Marine Safety lieutenants, and above them to Marine Safety captains; the captains reported to the Chief of the Marine Safety Section, who was directly supervised by the Recreation Superintendent; the Recreation Superintendent reported to the Director of Parks & Recreation who, in turn, reported to the City Manager.

6. The Court specifically finds that both Marine Safety lieutenants and Marine Safety captains acted in a supervisory capacity vis-a-vis the ocean lifeguards. In particular, the Court finds that Marine Safety Chief Bill Terry, Marine Safety Lieutenant, and later Captain, David Silverman, and Marine Safety Lieutenant, and later Training Captain, Robert Gordon were supervisors of the ocean lifeguards.

7. The Court, however, specifically finds that neither Terry, nor Silverman, nor Gordon had the standing necessary to qualify as higher management for the City.

8. As Chief of Marine Safety, Terry reported to the Recreation Superintendent, which position was held

by Lorraine Gardner from 1974 to 1988, by Sandy Dioli-Kumm from 1988 to 1989, and by Buddy Parks thereafter.

9. The City hired its first female lifeguard in 1977. During the time of the plaintiffs' employment, not more than four to six lifeguards, out of a total force of between forty and fifty, were female.

10. The Marine Safety Headquarters is a small, one-story building, which includes a small office, a meeting room, and a locker room. Because of the limited facilities, all of the guards share the same locker room and shower.

11. The confined space at the headquarters building, along with the disproportionate ratio of female to male lifeguards, were in and of themselves conducive to a sort of camaraderie that might, in retrospect, be considered somewhat boisterous. Despite this apparent rambunctiousness, the Court finds credible Ewanchew's statement that the atmosphere in the locker room was respectful among members of a particular shift.

12. In April, 1989, Ewanchew resigned her position with the City. Her stated reason for leaving was that she had found a better job. Thereafter, Ewanchew worked as a lifeguard for Palm Beach County and for the City of Delray Beach. Some time after she had resigned from her position with the City, Ewanchew visited Terry and requested reemployment on a part-time basis. Ewanchew, however, did not become reemployed by the City.

13. Faragher had worked for the City mostly on a part-time and summer basis while attending college. In

June, 1990, Faragher resigned her position to attend law school. Faragher's decision to leave the City was unrelated to the alleged sexual harassment. Moreover, Faragher did not discourage her own sister from applying for a position as a lifeguard with the City.

B. Bill Terry's conduct

14. It is manifestly clear to the Court that the repute in which Terry was held by his co-workers in the Marine Safety Section was poor. Terry apparently exuded an aura of hostility to most of his subordinates in that section. In short, he was anything but dear to them. Even in the testimony of Captain Richard Morrison, who had worked under Terry for ten years, the Court detected a note of what could at best be characterized as detachment toward his superior. In an apparent effort to mask these feelings, Captain Morrison's responses were somewhat evasive and, when unavoidable, terse.

15. Terry had a propensity to touch female employees on various parts of their anatomies, including the waist, neck, and buttocks. The Court specifically finds that all incidents of touching by Terry, testified to by the witnesses at trial, were uninvited.

16. Further in this regard, the Court has concluded that Terry's testimony denying specific acts testified to by other witnesses is not credible. The Court attempted to reconcile these obvious conflicts in testimony so as not to impute falsehood to some witnesses, particularly Terry, without success. Therefore, the Court finds Terry's testimony in the face of the testimony of other witnesses, substantially less than credible.

17. A particularly egregious incident involving Terry and Ewanchew occurred at the water fountain in the meeting area of the headquarters building. As described by Ewanchew, Terry pressed himself against Ewanchew's buttocks and moved his hips simulating sexual movement.

18. In another incident testified to by Ewanchew, Terry touched Ewanchew on one breast and on the buttocks.

19. The Court finds credible Ewanchew's testimony that Terry would put his arm around Faragher and let his hand rest upon her buttock. Although Faragher's testimony was not as effective as Ewanchew's, the Court also finds quite credible Faragher's testimony regarding Terry's uninvited touching of her buttocks.

20. With regard to Terry's use of language, the Court finds that his remarks in Ewanchew's presence were more directed toward other women. One example is a remark to Ewanchew that Faragher was male-like because she had no breasts.

21. Former lifeguard Beverly Barta both witnessed and experienced offensive conduct on the part of Terry. The Court finds Barta's testimony that she found Terry's touching offensive most credible. According to Barta, Terry touched her on the buttocks without her consent and she avoided him afterwards. The Court finds incredible Terry's specific denial of Barta's assertions, whom the Court found made a highly credible, reliable, and impartial witness.

22. The Court finds credible former lifeguard Jamie Herrington's testimony that Terry placed his hand

on her thigh, and that Terry referred to women as "cunts" and "bitches." According to Herrington, however, neither Ewanchew nor Faragher complained to her about Terry.

23. The Court finds credible former lifeguard Victoria Bonner's testimony that Terry, on their first interview, asked her if she was going to "fuck" or "screw" all of the male lifeguards like the rest of the female lifeguards, and that she avoided him thereafter.

24. The Court finds credible former lifeguard Gayle Nye's deposition testimony that she was the subject of several instances of offensive touching by Terry, such as putting his arm around her hip. Nye also observed Terry touching other lifeguards, including Ewanchew and Faragher.

25. The Court finds credible former Marine Safety Section secretary Kathy Buhr's testimony that she did not invite, but was the recipient of, touching by Terry, such as neck rubs. Buhr further testified that she did not object to, nor take offense at such actions.

26. The Court discounts former Marine Safety Section secretary Janice Chisesi's testimony. Although Chisesi admitted to some instances of touching by Terry in the form of neck rubs, she stated that she did not find these offensive. At the same time she portrayed herself as a very proper person, who would be offended by the use of off-color language in her presence. This inconsistency in Chisesi's testimony may be explained by her current position as secretary to the City's Recreation Manager.

C. David Silverman's conduct

27. The Court finds that an incident occurred where Silverman tackled Faragher. The Court finds credible Faragher's testimony regarding the following statement by Silverman directed to Faragher: "If you had tits I would do you in a minute." With regard to these incidents, the Court disbelieves Silverman's denial of their occurrence.

28. The Court also finds that Silverman did engage in a pantomime depicting cunnilingus by flicking his tongue, in the presence of both Faragher and Ewanchew, despite Silverman's denial of his having engaged in such conduct.

29. Ewanchew testified that Silverman was her lieutenant and he would make the rounds of the beach in that capacity. While making these rounds, Silverman made the following remark to Ewanchew, "You'll be making the rescues today, because I'm the boss." Silverman also made inappropriate, but not sexually oriented, remarks to Ewanchew, such as, "There are a lot of tits on the beach today."

30. According to Ewanchew's credible testimony, Silverman used the term "helmet" to refer to a man's penis. The Court does not find credible lifeguard Red Rothberger's attempt to impute the use of this term on Ewanchew. In light of other witnesses' corroborating testimony, however, the Court finds truthful Rothberger's attribution of the term "red flag day," referring to her menstruation, to Ewanchew. The term "red flag" among lifeguards means "no swimming."

31. The Court found some of Ewanchew's testimony regarding Silverman exaggerated, such as her dreams about Silverman chasing her and about Terry and

Silverman shooting her, her husband, and infant child in the courtroom. Despite these exaggerations, the Court found Ewanchew fairly credible, albeit it was obvious that she had an ax to grind. The problem with Ewanchew's credibility stems in part from the Court's finding credible her allegations of the conduct by both Terry and Silverman but finding not credible her "then" feeling of intolerability. She appears to have tolerated such conduct not because she felt she had to but because it wasn't that important to her. Moreover, Ewanchew stated that she was never propositioned by either Terry or Silverman.

32. Ewanchew's credibility also suffered by her refusal to admit that she had not graduated from Miami Dade Community College. She avoided a direct response on this issue by stating that she had intended to finish. Ewanchew's prevarication about her educational background in her application for employment with the City appears to have made her more sensitive to some of the remarks made by Silverman.

33. Silverman testified to conversations with Ewanchew about his sexual activities with others, as well as discussions about sexual positions. Silverman also stated that Ewanchew confided in him about her sexual activities with other males, such as oral sex with fellow lifeguard Dan McCarthy. Finally, Silverman described how Ewanchew would expose her breasts to him in a playful manner. The Court found none of this testimony to be credible, particularly because of Silverman's unsuccessful attempt to present a relaxed demeanor on the witness stand.

34. The Court finds credible Jamie Herrington's testimony that Silverman referred to her nipples being apparent under the cloth of her bathing suit because it

was cold, and Silverman's remark that he would like to "eat between her legs." The latter comment took place only in her presence. Moreover, neither Ewanchew nor Faragher complained to Herrington about Silverman. According to Herrington, Silverman "cleaned-up his act" after he was promoted to Marine Safety captain in June, 1989.

35. The Court finds credible former lifeguard Kelly Evans' deposition testimony that Silverman commented on her breasts, but that his comments did not bother her. Although she was friends with Faragher, the two never discussed sexual harassment. Evans also testified in her deposition that Ewanchew used the term "red flag day."

36. The Court finds credible Gayle Nye's deposition testimony regarding Silverman's use of offensive language when addressing her. On her first day on the job, Silverman said to her, "I want to lick your clit." On another occasion, after she had blown an air horn close to his ear, Silverman said to her, "What the fuck are you doing, you cunt, doing that in my ear!" Although he denied using such language, Silverman admitted to coming down hard on Nye during the air horn incident, which he claims caused him ear discomfort for some time afterwards.

37. As previously mentioned, the Court found Beverly Barta to be a most credible witness. Barta both witnessed and experienced offensive conduct from Silverman, as well as from Terry. Thus, she corroborated the existence of a hostile atmosphere as a result of Terry and Silverman's conduct.

38. Although Silverman was reprimanded for using the words "Huck U" doing a beach workout, the Court was not impressed with the significance of this incident upon the plaintiffs' case.

D. Color of state law

39. Based on its previous finding that both Terry and Silverman were supervisors of the ocean lifeguards, the Court finds that Terry and Silverman's sexual harassment conduct toward the lifeguards, specifically toward Faragher and Ewanchew, was under color of state law.

40. This finding is further supported by Beverly Barta's highly credible assertion that she was "blackmailed" into signing an undated resignation letter

by Silverman and Terry; and by Bender's testimony that he discovered this recurrent practice on the part of Terry during his investigation of Ewanchew's complaints.

E. The City's role

41. On April 23, 1990, Ewanchew wrote a letter to Richard Bender, Director of Personnel for the City, complaining that, during the time she was employed by the City, she and other female lifeguards had been sexually harassed by Terry and Silverman.

42. Based on Bender's investigation of Ewanchew's complaint, the City determined that there had been some inappropriate conduct on the part of Terry and Silverman. The City reprimanded both Terry and Silverman for that conduct on June 26, 1990, imposing a choice of disciplinary action in the form of suspension without pay or forfeiture of annual leave. Terry and Silverman forfeited 160 and 40 hours of annual leave, respectively.

43. The Court finds Bender's testimony, in some measure, quite credible. Upon receiving Ewanchew's complaint, Bender moved quickly to investigate and discover specific acts on the part of Terry and Silverman which, in Bender's view, may have constituted inappropriate behavior. Bender's testimony regarding what he was told during his investigation was truthful, particularly with regard to Faragher's characterization of Terry's touching her as "fanny pats." The Court, however, does not quite accept Bender's assessment, based on his interview of Faragher, that Faragher did not indicate apprehension of both Terry and Silverman.

44. With regard to Bender's conclusions, and the discipline imposed upon Terry and Silverman as a result of Bender's recommendation, the Court does not find nor rule that this action is relevant to the issues presented at trial. Nevertheless, the Court notes that Bender exhibited a somewhat cavalier attitude toward the severity of Terry and Silverman's conduct, and its potential effect upon the City. Indeed, the Court expressly finds that Terry's and Silverman's sexual harassment conduct toward females in the Marine Safety Section was both severe and pervasive. In reaching this conclusion, the Court finds that the witnesses for the defense failed to overcome the weight of the plaintiffs' evidence regarding the degree and prevalence of Terry and Silverman's offensive conduct. Indeed, the Court finds that considerable corroborating evidence was presented at trial regarding the hostile atmosphere created by Terry and Silverman.

45. Prior to Ewanchew's letter, neither Ewanchew, nor Faragher, nor any other lifeguard had complained to the Parks and Recreation Department management about any alleged sexual harassment by Terry and Silverman.

46. As part of her duties as Recreation Superintendent, Sandy Dioli-Kumm occasionally counseled some of the lifeguards. Ewanchew came to see Dioli-Kumm to discuss work-related issues on several different occasions. Ewanchew never mentioned anything about sexual harassment or offensive words or touching by Terry or Silverman. The Court, however, does not lend much credence to the balance of Dioli-Kumm's testimony, particularly her statement that she engaged in "covert" observation of Marine Safety personnel because she found them to be "sophomoric."

47. The Court finds the testimony of Lorraine Gardner, Dioli-Kumm's predecessor in the position of Recreation Superintendent, not credible and wholly without weight. Gardner's responses appeared rehearsed and she showed favoritism toward the City. One such obviously contrived, and less than credible, response on the part of Gardner was that she had "never" had "any" female lifeguards come to her office about "anything."

48. Although Faragher and Ewanchew did not complain to higher management, they did speak about Terry and Silverman's conduct to former Marine Safety Lieutenant and Training Captain Robert ("Flash") Gordon. Moreover, the majority of the female lifeguards complained to Gordon about Silverman's language and conduct. The lifeguards talked to Gordon, not on a subordinate to superior basis, but because of the high repute in which he was held by members of the Marine Safety Section. Gordon did not report these complaints to his supervisor, Bill Terry, or to any other City official. He did not feel that it was his place to pass complaints on to his superiors. According to Ewanchew's testimony, Gordon responded to her complaints by stating that the City just didn't care.

49. With regard to Gordon's testimony, the Court notes that he was obviously uncomfortable on the witness stand. Gordon conceded that he had been unhappy over Silverman's, instead of his, promotion to full-fledged Marine Safety captain. Also, Gordon admitted that he had sued the City and the two individual defendants, but that the suit had terminated. It is obvious from his demeanor on the witness stand that Gordon was hesitant to "take sides" in the present litigation, and that he limited his testimony accordingly.

50. With regard to Ewanchew's waiting a year after leaving the City's employment to write to Bender complaining about Terry and Silverman, the Court finds credible Ewanchew's statement that she was reluctant to complain prior to becoming tenured in her new position. The Court finds, however, that the contemporaneous firing of her then boyfriend Dan McCarthy, a former City lifeguard, contributed to Ewanchew's decision to write to Bender.

51. The City had a written sexual harassment policy, promulgated on February 26, 1986. The policy was contained in a memorandum from the City Manager, addressed to all employees. On May 7, 1990, the City revised and reissued its policy against sexual harassment in the form of a Personnel Policy and Procedure Memorandum.

52. Notwithstanding the existence of a written policy against sexual harassment, the Court finds a complete failure on the part of the City to disseminate said policy among Marine Safety Section employees. Neither Terry nor Silverman were ever told or made aware of the City's sexual harassment policy prior to Bender's investigation of Ewanchew's charges. Ewanchew herself never got a copy of the sexual harassment policy during her tenure with the City. The City, therefore, did not discharge its duty under the EEOC guidelines regarding the maintenance of an effective sexual harassment policy.

53. The same union bargaining unit has represented the lifeguards and lieutenants working for the Marine Safety Division since sometime before 1985. The unit has a collective bargaining agreement with the City, which includes an employee grievance and arbitration procedure. Faragher and Ewanchew did not initiate

grievance proceedings. In light of the City's lack of dissemination of its sexual harassment policy, the Court finds that Faragher and Ewanchew's failure to avail themselves of grievance proceedings, in and of itself, does not excuse the City from responsibility for the conduct of Terry and Silverman.

54. The Court does not find that the City's management knew of the respective acts complained of by Faragher and Ewanchew prior to Bender's receipt of Ewanchew's letter. Nor does the Court impute to the City Gordon's actual knowledge of the lifeguards' complaints regarding Terry's and Silverman's conduct, despite Gordon's supervisory position. As previously noted, the Court does not find that Marine Safety captains ranked as higher management in the City.

55. According to Beverly Barta's credible testimony, she both experienced and witnessed offensive conduct on the part of Terry and Silverman. However, Barta testified that she did not hear others complain about Terry and Silverman. The Court assigns the highest level of credibility to Barta's testimony due to her candor, responsiveness, and directness. Her lack of awareness of other lifeguards' complaints about Terry and Silverman's conduct casts doubt on the City's ability to be aware of such conduct. In resolving this issue, the Court has taken into consideration the fact that there were only four female lifeguards working at the time Barta worked for the City and that Barta worked part-time. The Court has also considered the uniqueness of the lifeguard unit which, although part of the City, was not as aligned as other departments and was far enough away from City Hall as to constitute a remote location. In light of these factors, the Court concludes that Barta's lack of awareness

does not, in and of itself, excuse the City from responsibility for the conduct of Terry and Silverman.

F. Plaintiffs' damages

56. The Court finds credible the opinion of defense expert, Dr. I. Bruce Frumkin, that Ewanchew does not suffer from post-traumatic stress syndrome, but that she is extremely depressed. According to Dr. Frumkin, Ewanchew would benefit from one to two years of psychological treatment. Because he only conducted an abbreviated evaluation of Ewanchew, Frumkin expressed no opinion on the effect of sexual harassment upon her.

57. The Court finds the testimony of plaintiffs' expert, Dr. Glenn R. Caddy, highly credible and qualified. According to Dr. Caddy, Ewanchew was extremely upset and depressed when he first saw her, due to the present litigation. He found that she had suffered sexually oriented mistreatment by some of the people with whom she had dealt in the past. Although he has no present diagnosis for Ewanchew, he noted that her current state relates back to childhood problems, which make her more vulnerable to sexual trauma than someone without her prior experiences.

58. Although Faragher visited Dr. Caddy once, she did not follow through with psychological treatment. Moreover, Faragher did not seek psychiatric care from any other professional.

55.[sic] Ewanchew is entitled to compensatory damages in the amount of $ 35,000.00

59. Faragher is entitled to compensatory damages in the amount of $ 10,000.00.

60. Silverman is not liable for punitive damages.

61. Terry is liable for $ 2,500 in punitive damages.

CONCLUSIONS OF LAW

In its conclusions of law, the Court addresses in turn each of the claims considered at the trial of this action.

1. Faragher's Title VII claim against the City (Count I)

Courts recognize two theories under which plaintiffs may pursue Title VII claims for sexual harassment: (1) quid pro quo; and (2) hostile environment. Steele v. Offshore Shipbuilding Inc., 867 F.2d 1311, 1315 (11th Cir. 1989). Faragher presents a hostile environment claim. Hostile environment sexual harassment occurs when an employer's conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986).

The elements of a prima facie case for hostile environment sexual harassment are:

(1) the employee belongs to a protected group;

(2) the employee was subject to unwelcome sexual harassment;

(3) the harassment complained of was based upon sex;

(4) the harassment complained of affected a "term, condition, or privilege" of employment; and

(5) respondeat superior.

Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).

The first three elements of the prima facie case do not require much analysis. As a female, Faragher belongs to a protected group. Faragher was subject to unwelcome sexual harassment in the form of uninvited touching by Terry on the buttocks, in the form of offensive comments by Silverman such as, "If you had tits I would do you in a minute," and in the form of an offensive pantomime by Silverman mimicking cunnilingus. In this regard, the Court finds that Faragher made out a prima facie case as to Terry's touching and as to offensive language and gestures on the part of Silverman. Terry and Silverman directed their conduct toward the female lifeguards and secretaries in the Marine Safety Section. Thus, the harassment complained of by Faragher was based upon her being a female.

Whether the harassment complained of affected a "term, condition, or privilege" of employment

The fourth element of the prima facie case requires closer scrutiny. "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." Harris v. Forklift

Systems, Inc., 114 S. Ct. 367, 371 (1993). Whether an environment is hostile or abusive can be determined only by looking at all the circumstances. Id. The factors to be considered may include:

> - the frequency of the discriminatory conduct;
>
> - its severity;
>
> - whether it is physically threatening or humiliating, or a mere offensive utterance;
>
> - whether it unreasonably interferes with an employee's work performance;
>
> - the effect on the employee's psychological well-being, which is relevant to determining whether the plaintiff actually found the environment abusive.

Id.

Terry had a propensity to touch female employees of the Marine Safety Section on various parts of their anatomies without their consent. Former lifeguards Ewanchew, Faragher, Barta, Herrington, and Nye and former secretaries Buhr and Chisesi were the recipients of uninvited touching by Terry. Terry touched Ewanchew's buttocks and breast, Faragher's buttocks, Barta's buttocks, Herrington's thigh, Nye's hip, and Buhr's and Chisesi's necks. All except the secretaries credibly testified that they found such touching offensive. In addition, Terry used offensive language when speaking to female employees such as Ewanchew, Herrington, and Bonner. Terry described Faragher to Ewanchew as "male-like" because Faragher had no breasts. In speaking to Herrington, Terry referred to women as "cunts" and

"bitches." Terry asked Bonner if she was going to "fuck" or "screw" her male co-workers. Silverman tackled Faragher and stated to her, "If you had tits I would do you in a minute." He used the word "helmet" to refer to a man's penis when speaking to Ewanchew. He mimicked cunnilingus by flicking his tongue in the presence of Faragher and Ewanchew. He commented to Herrington that her nipples showed through her swimsuit and that he would like to "eat between her legs." He made a comment to Evans about her breasts. He stated to Nye that he wanted to "lick her clit" and used the words "fuck" and "cunt" when complaining about her blowing an air horn close to his ear. All except Evans found such remarks offensive.

Based on the number of lifeguards that testified to such conduct, the Court finds that Terry's and Silverman's offensive conduct occurred fairly frequently. The Court also finds that the uninvited touching, the use of the cited terms, and the mimicry constitute fairly severe conduct. In this regard, the Court rejects the defendants' characterization of Terry's and Silverman's language as "banter." The Court finds a significant difference between the consensual sprinkling of off-color terms into everyday conversation and the recurrent use of terms such as "cunt" and "bitch" by males in their conversations with females. Moreover, the Court finds that uninvited touching, the use of words like "cunt" and "bitch," and a pantomime of oral sex constitute conduct that humiliates women.

The Court finds that Terry's and Silverman's conduct unreasonably interfered with Faragher's work performance by promoting an environment where female lifeguards were considered fair game for uninvited touching and offensive remarks. The Court has recognized

that the level of camaraderie among the lifeguards in the Marine Safety Section bordered on boisterousness due to the disproportionate ratio of female to male lifeguards and the cramped quarters where the lifeguards were often running into each other. Camaraderie, however, is not synonymous with the lack of respect evidenced by Terry's and Silverman's conduct toward their female co-workers, including Faragher.

The effect of the environment created by Terry's and Silverman's conduct upon Faragher is more difficult to quantify. Based on Faragher's testimony, the Court has no doubt that Faragher neither invited nor appreciated her supervisors' conduct. Faragher, however, seems to have gone about her business despite such conduct without complaining to anyone except Gordon. Indeed, Faragher does not appear to have found the Marine Safety Section atmosphere sufficiently adverse to caution her own sister against applying for a position there. Faragher's position as a part-time and summer employee, and her concomitant college studies, may help explain her apparent nonchalance regarding the environment created by Terry and Silverman. Moreover, Faragher does not appear to have been exposed as much as Ewanchew to overt physical acts by Terry. Looking at the totality of the circumstances, therefore, the Court finds Terry's and Silverman's conduct sufficiently severe or pervasive to alter the conditions of Faragher's employment and create an abusive working environment, despite Faragher's attenuated reaction to such environment.

Respondeat superior

A plaintiff may prove the fifth element of a hostile environment claim either directly or indirectly. To prove this element, the employee "must show that the employer

knew or should have known of the harassment in question and failed to take prompt remedial action." Henson, 682 F.2d at 905. "The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment, or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." Id. The pervasiveness analysis applicable to the fourth element is the same as that required for constructive notice under the fifth element. Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1513 (11th Cir. 1989).

The Eleventh Circuit has indicated that application of a strict liability standard to employers is illogical in a pure hostile environment setting. Steele, 867 F.2d at 1316. However, the Eleventh Circuit has acknowledged that, even in pure hostile environment cases, the trier of fact must determine whether the harasser was acting as an agent of the employer, in which case the employer is directly liable and the plaintiff need not show either actual or constructive notice. Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988) (following Meritor Savings Bank v. Vinson, 477 U.S. 57, 71, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986), where the Supreme Court said agency principles apply to the determination of corporate liability under Title VII). See also Vance, 863 F.2d at 1514-15. In making this agency determination, the trier of fact must consider not only the supervisor's direct authority over the plaintiff but also the overall structure of the workplace, including the relative positions of the parties involved. Relevant questions regarding this relationship include the supervisor's authority to: designate work assignments and staffing of shifts, to suspend employees, to place discipline reports in employee personnel files, to handle union grievance

proceedings, and to make personnel changes in his department. Id. at 1515.

The Court has found that the City had no actual knowledge of Terry's and Silverman's sexual harassment prior to Personnel Director Richard Bender's receipt of Ewanchew's letter. The Court, however, has found Terry's and Silverman's conduct sufficiently severe or pervasive to alter the conditions of Faragher's employment and create an abusive working environment. This finding of pervasiveness supports an inference of knowledge, or constructive knowledge, on the part of the City regarding Terry's and Silverman's sexual harassment, making the City indirectly liable for such conduct.

In addition to considering indirect liability through constructive notice, the Court must determine whether the City is directly liable for Terry's and Silverman's conduct under agency principles. The Court has found that Terry, Silverman, and Gordon were all supervisors of the City's ocean lifeguards. In making this determination, the Court has considered all of the testimony related to these individuals' duties and authority toward the lifeguards. As Marine Safety Chief, Terry had the authority to supervise all aspects of the lifeguards' work assignments, to conduct counseling and oral reprimands and place reports of such disciplinary actions in the lifeguards' personnel files. Terry also interviewed and selected new lifeguards, subject to approval by higher management. As lieutenant and later, as captain, Silverman had supervisory responsibility over the lifeguards' daily duties, including designation of the lifeguards' work assignments and staffing of shifts, and supervision of their physical fitness routines. Gordon had similar responsibilities as lieutenant and, later, training captain. Moreover, the paramilitary configuration of the

Marine Safety Section constitutes evidence of a clear chain of command from lieutenants to captains to the chief. Through this chain of command, the City vested in the Marine Safety supervisors both administrative and disciplinary authority over the lifeguards. Indeed, the lifeguards' contacts with higher city officials, such as the Recreation Superintendent, were almost non-existent. [1]

Taking into consideration this overall workplace structure, as well as their supervisory authority, the Court finds that Terry, Silverman, and Gordon were agents of the City. Because the two harassers in this action, Terry and Silverman, were acting as agents of the City, the City is directly liable and Faragher need not show either actual or constructive notice of the harassing conduct on the part of the City. Moreover, although not a harasser himself, Gordon knew of the lifeguards' discomfort with Terry's and Silverman's conduct but failed to report the complaints brought to him to either Terry or to the City's management. This knowledge on the part of the City's agent, and the agent's inaction, provides a further basis for imputing liability on the City.

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1. The Court uses the past tense in this description advisedly. As noted in the findings of fact, Bill Terry no longer holds the position of Marine Safety Chief. In addition, according to testimony presented at trial, the City has effected a restructuring of the beach patrol and ancillary water recreation services under the name of "Aquatics."

Remedial action

Having found that Faragher proved a prima facie case for hostile environment sexual harassment, the Court next considers the City's defense that it took prompt remedial action upon learning of Terry's and Silverman's conduct. The Court has found that, once the City received actual knowledge of Terry's and Silverman's conduct in the form of Ewanchew's letter to Bender, the City acted with dispatch to investigate and remedy the situation. The Court, however, has found that the City should have known about the conduct prior to receipt of Ewanchew's letter through constructive notice.[2] Therefore, the Court must examine the City's efforts to prevent sexual harassment prior to Bender's investigation.

In this respect, the Court has found a complete failure on the part of the City to disseminate its written sexual harassment policy among Marine Safety Section employees. Indeed, not even the supervisors were ever told or made aware of the City's policy against sexual harassment prior to Bender's investigation. Therefore, the City's written sexual harassment policy does not excuse it from liability. The Court has also found that Faragher did not avail herself of the existing union grievance proceedings to register a complaint about Terry's and Silverman's conduct. The City's failure to disseminate its policy against sexual harassment, however, makes such avenue of complaint ineffectual. See Cronin v. United Serv. Stations, Inc., 809 F. Supp. 922,

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2. The Court has also found that the City is liable for the conduct, regardless of notice, on agency principles.

929 (M.D. Ala. 1992) (To avoid respondeat superior liability, an employer must provide some avenue by which an employee can make the employer aware of the illegal conduct.).

Having found no merit in the City's defense, the Court concludes that the City is liable for Faragher's Title VII claim. The Court has already determined that Faragher is not entitled to compensatory damages on her Title VII claim, as provided under the 1991 Civil Right Act, because the events giving rise to the claim took place prior to the enactment of the Act. See Order Granting in Part and Denying in Part Defendants' Motions to Dismiss and/or Strike, filed August 13, 1992, at 4-5. The Court has also determined that Faragher is not entitled to injunctive or declaratory relief because she is no longer employed by the City and she does not seek reinstatement of her position. See id. at 5. Therefore, the Court shall award Faragher nominal damages in the amount of one dollar.

2. Faragher's (Count II) & Ewanchew's (Count III) §1983 claims against Terry & Silverman

A § 1983 cause of action lies against a defendant who, acting under color of state law, deprives a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. Bendiburg v. Dempsey, 909 F.2d 463, 468 (11th Cir. 1990). Several circuits have either explicitly or impliedly recognized the existence of a § 1983 cause of action for sexual harassment, as violative of the equal protection clause of the fourteenth amendment. See, e.g., Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986); Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989); Headley v. Bacon, 828 F.2d 1272 (8th Cir. 1987); Pontarelli v. Stone, 930 F.2d 104 (1st Cir. 1991); Carrero v. New York City Hous.

Auth., 890 F.2d 569 (2d Cir. 1989); Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988). Although the Eleventh Circuit has not yet addressed this precise issue, the Court has determined, based on the weight of authority from other circuits, that such a cause of action is cognizable.

A. Color of state law:

A person acts under color of state law when his or her actions are "fairly attributable to the State," that is, when the person's "official character is such as to lend the weight of the State to his [or her] decisions." Burch v. Apalachee Community Mental Health Servs., Inc., 840 F.2d 797, 803 (11th Cir. 1988) (citations omitted). The Court has found that both Terry and Silverman were supervisors of the lifeguards, including Faragher and Ewanchew. Such supervisory authority lent the weight of the City to their decisions and conduct toward the plaintiffs. Therefore, the Court concludes that Terry and Silverman acted under color of state law.

B. Violation of the plaintiffs' constitutional right to equal protection:

In Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990), the Seventh Circuit has provided a comprehensive analysis regarding the equal protection element of a § 1983 cause of action. According to Trautvetter, a plaintiff wishing to sustain an equal protection claim of sexual harassment must show both "sexual harassment and an intent to harass based upon that plaintiff's membership in a particular class of citizens--i.e. male or female." The "harassment" prong is met by showing actionable harassment under Title VII. The "intent" prong requires proof that the defendant's discriminatory conduct was intentional; that is, the conduct was because of the

plaintiff's status as a male or female, rather than because of some other personal characteristic. Id. at 1150.

Faragher's § 1983 claim

Faragher has proved a Title VII claim against the City based on Terry's and Silverman's conduct. Therefore, Faragher has met the harassment prong of her § 1983 claim against the individual defendants. The Court also finds that Terry's and Silverman's discriminatory conduct was intentional because it was directed to Faragher due to her status as a female. Indeed, the credible testimony of all of the female lifeguard witnesses leads the Court to the conclusion that Terry and Silverman preyed on the female members of the Marine Safety Section. Therefore, the Court finds that Faragher has proved her § 1983 claims against both Terry and Silverman.

As a defense to Faragher's § 1983 claim, Terry argues that he is protected by qualified immunity because his conduct did not violate clearly established law. "Qualified immunity protects government officials performing discretionary functions from civil liability if their conduct violates 'no clearly established statutory or constitutional rights of which a reasonable person would have known.'" Post v. City of Fort Lauderdale, 7 F.3d 1552, 1556 (11th Cir. 1993) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). In addressing this issue, the Court follows the two-step analysis established by the Eleventh Circuit:

> We must determine (1) whether the official established that he or she acted within the scope of discretionary authority when the allegedly wrongful acts occurred, and (2) whether the

plaintiff demonstrated that the official's actions violated clearly established rights.

Sims v. Metropolitan Dade County, 972 F.2d 1230, 1236 (11th Cir. 1992). Terry has not shown that he acted within the scope of his discretionary authority as Marine Safety Chief when he sexually harassed Faragher. Indeed, it is difficult for the Court to conceive of a situation where a supervisor's discretionary authority includes uninvited touching of subordinates. Thus, Terry does not satisfy the first prong of the qualified immunity analysis. The Court further finds that Terry has not met the second prong of the qualified immunity inquiry. The statutory right to be free of discrimination based upon sex in the workplace is embodied in Title VII of the 1964 Civil Rights Act. Moreover, since 1986, a § 1983 cause of action for sexual harassment, as violative of the equal protection clause of the fourteenth amendment, has been recognized by the Seventh Circuit. See e.g., Bohen v. City of East Chicago, 799 F.2d 1180 (7th Cir. 1986). None of the circuits that have addressed this issue since Bohen have found otherwise. Therefore, during the time of Faragher's tenure with the City, from 1985 to 1990, a reasonable person would have known that sexual harassment violates clearly established law. See Andrews v. City of Philadelphia, 895 F.2d 1469, 1479 (3d Cir. 1990).[3] Based

3. In Woodward v. City of Worland, 977 F.2d 1392 (10th Cir. 1992), cert. denied sub nom Woodard [sic] v. Seghetti, 125 L. Ed. 2d 724, 113 S. Ct. 3038 (1993), the Tenth Circuit disagreed with the Andrews court's analysis and found that the law on this matter was not clearly established in the Tenth Circuit until that circuit explicitly found a § 1983 cause of action for sexual harassment in 1989. Were the Court to follow this reasoning, it would have to find that the law will not be clearly established in the Eleventh Circuit until the Eleventh Circuit addresses this issue. The Court finds such an approach toward the advance of the law too

on the foregoing analysis, the Court finds no merit in Terry's qualified immunity defense. Hence, the Court finds that Terry and Silverman are liable for Faragher's § 1983 claims against them.

Ewanchew's § 1983 claim

The Court next evaluates Ewanchew's proof to determine whether she has made out a Title VII claim, as required by the first prong of a § 1983 cause of action for sexual harassment. Like Faragher, Ewanchew presents a hostile environment claim. As previously noted, the elements of a prima facie case for hostile environment sexual harassment are:

(1) the employee belongs to a protected group;

(2) the employee was subject to unwelcome sexual harassment;

(3) the harassment complained of was based upon sex;

(4) the harassment complained of affected a "term, condition, or privilege" of employment; and

(5) respondeat superior.

Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).

parsimonious. The Court, therefore, adopts the reasoning in Andrews.

As in the case of Faragher, the first three elements can be addressed in short order. As a female, Ewanchew belongs to a protected group. Ewanchew was subject to unwelcome sexual harassment by Terry in the form of uninvited touching on the buttocks and on one breast, and in the form of offensive language, when referring to Faragher as being "male-like" because she had no breasts. Ewanchew was also subject to unwelcome sexual harassment by Silverman in the form of offensive comments such as, "There are a lot of tits on the beach today," and in the form of an offensive pantomime mimicking cunnilingus. Terry and Silverman directed their conduct toward the female lifeguards and secretaries in the Marine Safety Section. Thus, the harassment complained of by Ewanchew was based upon her being a female. Moreover, the respondeat superior analysis conducted by the Court in connection with Faragher's Title VII claim is directly applicable to Ewanchew. Therefore, to determine whether Ewanchew has made out a Title VII claim, the Court need only address the fourth element of the prima facie case, whether the harassment complained of affected a "term, condition, or privilege" of Ewanchew's employment.

In conducting this inquiry under Faragher's Title VII claim, the Court has found that Terry's and Silverman's conduct created an abusive working environment. In reaching this determination, the Court found that Terry's and Silverman's conduct was fairly frequent and severe, that such conduct is humiliating to women and that it unreasonably interferes with a female lifeguard's work performance. As with Faragher, however, the Court has found it difficult to gauge the effect of this environment upon Ewanchew. As previously noted, the Court finds credible Ewanchew's allegations of conduct by both Terry and Silverman, but finds not

credible her present assertion that she found such conduct intolerable, then. Indeed, Ewanchew's request for a part-time job after she left the City's employ makes it illogical to find a perception of hostility in the work environment on her part. As noted by the United States Supreme Court in Harris v. Forklift Systems, Inc., 126 L. Ed. 2d 295, 114 S. Ct. 367, 370 (1993), "[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." Because an evaluation of Ewanchew's testimony leads the Court to conclude that she did not perceive the environment as abusive, the Court finds that Ewanchew has failed to establish the fourth element of a Title VII claim. Therefore, Ewanchew cannot satisfy the harassment prong of her § 1983 claim against Terry and Silverman. Hence, the Court finds that Terry and Silverman are not liable for Ewanchew's § 1983 claims against them.

3. Faragher's (Count IV) and Ewanchew's (Count V) battery claims against Terry

"To establish a battery, a plaintiff must suffer a harmful or offensive contact, and the tortfeasor must have intended to cause such contact. The intent may be established if the plaintiff demonstrates the tortfeasor acted with reckless disregard of the consequences of his act." Chorak v. Naughton, 409 So. 2d 35, 39 (Fla. 2d DCA 1981). The proven instances of Terry's uninvited touching of Faragher and Ewanchew constitute offensive contacts. Moreover, Terry's proven propensity to touch female employees on various parts of their anatomies, including the waist, neck, and buttocks, shows that he acted in reckless disregard for the consequence of his acts. Therefore, the Court has no difficulty in concluding that

Terry is liable for both Faragher's and Ewanchew's battery claims against him.

4. Faragher's (Count VI) and Ewanchew's (Count VII) claims for negligent retention and supervision of Terry against the City

"Negligent retention of an employee occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with the employee that indicate his unfitness, but the employer fails to take further action, such as investigation, discharge, or reassignment." Tallahassee Furniture Co., Inc. v. Harrison, 583 So. 2d 744, 753 (Fla. 1st DCA 1991), rev. denied, 595 So. 2d 558 (Fla. 1992) (citing Garcia v. Duffy, 492 So. 2d 435, 438 (Fla. 2d DCA 1986)). This actual or constructive notice requirement applies equally to claims for negligent supervision. M.V. v. Gulf Ridge Council Boy Scouts of America, Inc., 529 So. 2d 1248, 1248 (Fla. 2d DCA 1988). The establishment of a wrongful act, such as battery, by an employee is required in order to impose negligence liability upon an employer for negligent supervision and retention. See Walsingham v. Browning, 525 So. 2d 996, 998 (Fla. 1st DCA 1988).

Both Faragher and Ewanchew have proven their claims of battery against Terry. This wrongful act establishes one necessary element of negligent supervision and retention of Terry by the City. The other element is actual or constructive notice of Terry's unfitness and failure on the part of the City to take remedial action. The Court has determined that the City did not have actual notice of Terry's conduct prior to Personnel Director Richard Bender's receipt of Ewanchew's letter. The Court has also found that the City acted with dispatch to investigate Terry's conduct and to

discipline him after confirming that he had indeed engaged in inappropriate behavior. Therefore, the City is not liable for Terry's conduct under the actual notice prong of the negligent supervision and retention claims.

In examining Faragher's Title VII claim the Court found that the City should have known about Terry's and Silverman's conduct based on the pervasiveness of their conduct. The constructive notice test for negligent supervision and retention, however, does not contemplate the pervasiveness analysis of Title VII. Applying the standard of a reasonable employer to the City, the Court finds insufficient proof to establish that the City should have become aware of problems with Terry's conduct prior to Ewanchew's letter. In retrospect, it appears to the Court that the City may have given Terry too much control over Marine Safety Section. Indeed, it was obvious from the testimony of Dioli-Kumm and Gardner that these two Recreation Superintendents did not have much control over Terry. The City's restructuring of the water recreation services into a new "Aquatics" organization and the removal of Terry from supervisory duties provide further support for this assessment. Nevertheless, in light of the events that transpired prior to Ewanchew's letter, the Court does not find a sufficient predicate to impose constructive notice of Terry's conduct on the City. Therefore, the Court finds that Faragher and Ewanchew did not prove their claims of negligent supervision and retention of Terry against the City.

5. Damages

The Court awards nominal damages of one dollar to Faragher on her Title VII claim against the City. Faragher is also entitled to compensatory damages against Terry and Silverman on her § 1983 claim, and against

Terry on her battery claim. The Court has found that Faragher is entitled to $ 10,000.00 in compensatory damages. Therefore, the Court awards Faragher the sum of $ 10,000.00 in compensatory damages against Terry and Silverman, jointly and severally.

Ewanchew has prevailed on her battery claim against Terry and she is entitled to compensatory damages in the sum of $ 35,000.00. Therefore, the Court awards Ewanchew the sum of $ 35,000.00 in compensatory damages against Terry.

The Court has found that Terry is liable for $ 2,500.00 in punitive damages. Because the Court has found that Ewanchew was exposed to more overt acts on the part of Terry than Faragher, the Court awards Faragher $ 500.00 and Ewanchew $ 2,000.00 in punitive damages against Terry.

CONCLUSION

Pursuant to Fed.R.Civ.P. 58, the Court shall enter its final judgment by separate order in accordance with the foregoing findings of fact and conclusions of law.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 22 day of July, 1994.

Supreme Court, U.S.
FILED
OCT 14 1997
CLERK

(2)

No. 97-282

In the Supreme Court of the United States

OCTOBER TERM, 1997

BETH ANN FARAGHER,
Petitioner,

v.

THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR RESPONDENT THE CITY OF BOCA RATON IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded, under common-law agency principles and this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), that respondent City of Boca Raton was not liable under Title VII for the "hostile work environment" form of sexual harassment engaged in by two of the City's lifeguard supervisors.

LIST OF PARTIES

In addition to the parties named in the caption, the other parties in the court of appeals were plaintiff-appellant and cross-appellee Nancy Ewanchew and defendant-appellees Bill Terry and David Silverman.

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BRIEF FOR RESPONDENT THE CITY OF BOCA RATON IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-40a) is reported at 111 F.3d 1530. The order vacating the panel opinion is reported at 83 F.3d 1346. The panel opinion (Pet. App. 41a-68a) is reported at 76 F.3d 1155. The opinion of the district court (Pet. App. 69a-104a) is reported at 864 F. Supp. 1552.

STATUTE INVOLVED

This case concerns Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 255, which provides:

> It shall be an unlawful employment practice for an employer—
>
> > to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a)(1) (1994 ed.).

STATEMENT OF THE CASE

A. Underlying Facts

Petitioner has adopted the statement of facts set forth by the en banc court of appeals. Pet. 3-6. The following facts are undisputed:

Petitioner Beth Ann Faragher worked as an ocean lifeguard for the City of Boca Raton, Florida. The City employed Faragher intermittently from September 1985 until June 1990. Faragher worked for the City mostly on a part-time and summer basis while attending college. In 1988, after her graduation, she quit a full-time position in retail sales so that she could work full time on the beach. She resigned her lifeguard position in June 1990 to attend law school. Pet. App. 70a, 72a-73a.

The City's ocean lifeguards were part of the Marine Safety Section of the City's Parks and Recreation Department. Within the Marine Safety Section's chain of command, lifeguards reported to Marine Safety lieutenants, and above them to Marine Safety captains. The captains in turn reported directly to the Chief of the Marine Safety Section. The Chief of the Section was directly supervised by the Recreation Superintendent, and the Recreation Superintendent reported to the Director of Parks and Recreation. The Director of Parks and Recreation reported to the City Manager. Pet. App. 17a.

During the time that Faragher worked as a lifeguard, respondent Bill Terry served as Chief of the Marine Safety Section. Respondent David Silverman served first as a Marine Safety Lieutenant and then as a Captain. As Chief of the Section, Terry had the authority to supervise all aspects of the lifeguards' work assignments; to give oral reprimands and place reports of disciplinary actions in personnel files; and to interview and select new lifeguards subject to approval by higher management. Pet. App. 92a. As Lieutenant and later as Captain, Silverman supervised the lifeguards' daily duties, including designating work assignments and supervising physical fitness routines. *Id.*

The City's lifeguards had little contact with City officials. "Marine Safety Headquarters was at the beach—in a remote location, far away from City Hall." Pet. 4. Indeed, "the lifeguards' contacts with higher city officials, such as the Recreation Superintendent, were almost nonexistent." Pet. App. 93a. The district court explicitly found that neither Terry nor Silverman "had the standing necessary to qualify as higher management for the City." Pet. App. 71a. Petitioner does not challenge this finding.

During the course of Faragher's five years of intermittent employment as a lifeguard, Marine Safety Chief Terry subjected Faragher to uninvited and offensive touching, and Lieutenant Silverman made offensive comments and gestures to Faragher. In particular, Terry touched Faragher's shoulders or waist on a number of occasions, patted her thigh once in April 1990, and slapped her on the buttocks. Pet. 5.

Faragher never complained to Parks and Recreation Department management about Terry's and Silverman's conduct while she was employed with the City or when she resigned. Pet. 5. Faragher did not discourage her sister from applying for a job as a Boca Raton ocean

lifeguard, and she did not discuss sexual harassment with her friend Kelly Evans, who was another female lifeguard in the City's employ. Pet. App. 78a, 90a. Faragher did speak about Terry's and Silverman's conduct with former Marine Safety Lieutenant and later Training Captain Robert Gordon. In fact, most of the female lifeguards complained to Gordon about Silverman's language and conduct. The lifeguards did not speak with Gordon on a subordinate-to-superior basis; they spoke with him as a friend whom they held in high regard. Gordon did not report the complaints to his supervisor Terry or to any other City official. Pet. 5. The district court found that, like Terry and Silverman, Gordon did not have the standing necessary to qualify as higher management for the City. Pet. App. 71a. The court therefore did not impute to the City Gordon's actual knowledge of the complaints by Faragher and other lifeguards about Terry and Silverman. Pet. App. 84a.

Another lifeguard, Nancy Ewanchew, was also subjected to uninvited and offensive touching by Terry, and offensive comments and gestures by Silverman. There were two specific incidents in which Terry touched Ewanchew in a sexually offensive manner. Ewanchew, like Faragher, did not complain to the Parks and Recreation Department management about Terry's and Silverman's conduct while she was employed with the City or when she resigned. Ewanchew resigned her position with the City in April 1989, saying that she was leaving because she had found a better job. Pet. 4-6.

In April 1990, Ewanchew wrote a letter to the City's Director of Personnel, Richard Bender, complaining that she and other female lifeguards had been sexually harassed by Terry and Silverman while she was employed by the City. The City did not know about Terry's and Silverman's conduct until Bender received Ewanchew's letter. Pet. 5-6. The City then investigated Ewanchew's complaint and determined that Terry and Silverman had engaged in inappropriate conduct. The City reprimanded and disciplined both Terry and Silverman in June 1990.

In particular, Terry forfeited 160 hours of annual leave, and Silverman forfeited 40 hours of annual leave. Pet. App. 80a.

Faragher declined to come forward with any complaint in the fall of 1989, even though she knew she would be attending law school the following year. She also declined to complain in April 1990, after Ewanchew wrote to Bender, even though Ewanchew urged her to do so. Faragher reviewed the City's revised sexual harassment policy in May 1990, but she made no complaint at that time, even though the policy urged her to do so. R7-208 at 40-42.[1]

B. Proceedings in the District Court

A year and a half later, on January 6, 1992, Faragher and Ewanchew filed suit against the City of Boca Raton, Terry, and Silverman. After a non-jury trial, Terry and Silverman were found liable to Faragher under 42 U.S.C. § 1983, and Terry was found liable to Faragher on her claim of battery. Faragher was awarded $10,000 in compensatory damages against Terry and Silverman, jointly and severally, and she was awarded $500 in punitive damages against Terry. Terry was also found liable to Ewanchew on her battery claim. Ewanchew was awarded $35,000 in compensatory damages and $2,000 in punitive damages against Terry. Notwithstanding the ruling on Ewanchew's battery claim, the district court found that Ewanchew did not perceive her work environment as abusive and that she therefore failed to establish her § 1983 claim for sexual harassment. Pet. App. 100a-101a.

The district court also found the City liable to Faragher under Title VII.[2] The court awarded Faragher $1 in

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[1] R7-208 refers to Volume 7, Document 208, in the record in the court of appeals (Faragher's testimony).

[2] Faragher had originally brought a Title VII claim against Terry and Silverman individually, and she sought joint and several compensatory damages, as well as declaratory and injunctive relief

nominal damages against the City. By separate order dated March 28, 1995, the district court held the City, Terry, and Silverman jointly and severally liable for Faragher's attorneys' fees.

The court ruled that Terry's and Silverman's conduct was sufficiently severe or pervasive to create a hostile working environment. Pet. App. 89a-90a. Although the court found that the City had no actual knowledge of Terry's and Silverman's sexual harassment, the court nevertheless held the City liable under Title VII on two alternative theories.

First, the district court ruled that Terry's and Silverman's behavior was not only sufficiently pervasive to create a hostile work environment but that the same finding of "pervasiveness" was also sufficient to support "an inference of knowledge, or constructive knowledge" on the part of the City. Pet. App. 92a.

Second, the court held that, taking into consideration the "overall workplace structure," as well as the supervisory authority of Terry, Silverman, and Gordon, all three men were acting as "agents of the City," Terry and Silverman by engaging in their harassing conduct and Gordon by failing to report the complaints brought to him. Pet. App. 93a. On this basis, the court held that the City was liable under Title VII even in the absence of any actual or constructive notice to the City of the harassing conduct. The court did not find that Terry's and Silverman's supervisory authority over Faragher contributed to or facilitated the harassment. *Id.*

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against all three defendants. By pre-trial order dated August 13, 1992, the court struck the claim for compensatory damages against the City (because all of the events at issue occurred before enactment of the Civil Rights Act of 1991, *see Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)), struck the request for declaratory and injunctive relief, and dismissed the claim against Terry and Silverman individually.

C. The Decision of the Court of Appeals Panel

Faragher and Ewanchew appealed, and the City cross-appealed.[3] A panel of the court of appeals reversed the district court's ruling against the City on the Title VII claim and otherwise affirmed. The panel concluded that, although Terry and Silverman had created a hostile work environment for Faragher, none of the district court's alternative theories for holding the City liable under Title VII was meritorious.

Addressing first that portion of the district court's decision that focused on Terry's and Silverman's supervisory authority and the structure of the Marine Safety Section workplace, the panel observed that petitioner did not contend, and that the record in any event would not support a contention, that Terry and Silverman acted within the scope of their employment when they harassed Faragher. Pet. App. 59a, 63a. Nor was there evidence that Terry's and Silverman's exercise of their supervisory authority somehow aided or facilitated their harassment of Faragher. Pet. App. 63a-64a & n.14. Contrasting the facts of this case with those at issue in *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503 (11th Cir. 1989), and *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986), the panel ruled that Terry and Silverman did not invoke their authority over petitioner when they engaged in their harassment and that therefore the district court erred in relying on the structure of the Marine Safety Section workplace as a basis for Title VII liability. Pet. App. 61a-63a.

The panel similarly rejected that portion of the district court's decision that based Title VII liability on Gordon's failure to report Terry's and Silverman's sexual harassment. Noting the district court's finding that Gordon did not rank as higher management, and that notice to him could not be imputed to the City, the panel held that

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[3] Faragher and Ewanchew appealed the district court's ruling that the City was not liable on plaintiffs' claim alleging negligence in the City's retention and supervision of Terry.

Title VII liability also could not be predicated on Gordon's failure to report the complaints from Faragher or other lifeguards. Pet. App. 66a & n.16. As the district court found, Gordon did not receive this information as an agent of the City but rather as a friend whom the lifeguards regarded highly. Pet. App. 82a.

Finally, the panel rejected the district court's ruling that the pervasiveness of Terry's and Silverman's harassing behavior was in and of itself sufficient to give the City constructive notice of their wrongful conduct. Although the panel was prepared to assume that "[t]here may be cases in which it is difficult to draw the line where conduct becomes so pervasive that the employer should have known about it," the court held that "this is not such a case." Pet. App. 67a. The court observed that the district court had expressly found not only that the City had no actual knowledge of Terry's and Silverman's conduct but also that there was a complete absence in the record of any factual basis to conclude that the City should have known of Terry's and Silverman's conduct. *Id.*

D. The Decision of the En Banc Court of Appeals

In response to Faragher's petition for rehearing, the court of appeals vacated the panel decision and heard the case en banc. The only issues discussed by the en banc court concerned the question of the City's liability under Title VII. In all other respects, the en banc court affirmed the decision of the district court. Pet. App. 5a n.3.

The en banc court declared that it would address the following two issues:

(1) whether the City may be liable under Title VII for Terry's and Silverman's hostile environment sexual harassment of Faragher, regardless of its actual or constructive knowledge of that harassment; and

(2) whether the City knew or should have known of Terry's and Silverman's hostile environment harassment of Faragher.

Pet. App. 5a. On both issues, the en banc court concluded, like the panel, that the City was not liable.

The principal difference between the en banc decision and the panel decision was that the en banc court switched the way in which the labels "direct" and 'indirect" were used to refer to the different theories of the City's liability. Following the Restatement (Second) of Agency § 219, the en banc court used the term "direct" to refer to liability based on the theory that the City knew or should have known about Terry's and Silverman's wrongdoing, and failed to take appropriate corrective action. The court used the term "indirect" to refer to liability based on the theory that the harassment occurred within the scope of the supervisor's employment or that the supervisor's agency relationship with the City somehow aided or facilitated the supervisor's harassment of his subordinate. Pet. App. 7a-8a & n.4.

The en banc court turned first to the question whether the City could be held directly liable for Terry's and Silverman's harassing behavior. The court stated that "[t]his case presents the archetypical example of employees stepping outside the scope of their employment and seeking to further personal ends." Pet. App. 12a. It further observed that "[n]o person threatened to fire or demote Faragher for refusing to accommodate Terry's and Silverman's harassing overtures" and that "Terry and Silverman were not aided in accomplishing the harassment by the existence of any agency relationship with the City." Pet. App. 13a-14a. The court also stressed that "there is no evidence that either Terry or Silverman made any employment decisions based upon Faragher's response to their sexual overtures." Pet. App. 13a. For all these reasons, the court held that the City could not be held liable on an indirect liability theory. Like the panel, the en banc court refused to impute sexual harassment liability to an employer merely because the harasser possessed supervisory or disciplinary authority over the person who was being harassed.

On the issue of direct liability, the en banc court ruled that "the district court clearly erred in finding that the City's knowledge may be inferred from the fact that the conduct was pervasive enough to create an abusive work environment." Pet. App. 17a. Although the en banc court said that there may be cases in which harassing conduct becomes so pervasive that the employer should have known about it, it held that this case does not fall in that category. Pet. App. 16a-17a. The court commented that neither Faragher nor the district court identified any factual basis for concluding that the City should have known about the misconduct. The court also held that Faragher's complaints to Gordon did not provide a basis for holding the City directly liable, since Gordon did not occupy a higher management position, and, in any event, he received the complaints not in his capacity as an agent of the City but as a friend of Faragher and other lifeguards. Pet. App. 15a & n.9.

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted. Petitioner's assertions concerning a conflict among the circuits are misguided. There is no indication that any other court of appeals would have reached a different result on the facts of this case. All of the courts of appeals that have addressed hostile work environment claims since this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)—including all of the decisions on which petitioner relies—have, in accordance with this Court's ruling, applied common-law agency principles in determining when and under what circumstances an employer should be liable for an employee's harassing conduct. *See, e.g., Torres v. Pisano*, 116 F.3d 625, 633-34 & n.10 (2d Cir. 1997), *petition for cert. filed*, No. 97-578 (Oct. 1, 1997), *Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443-44 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997) (No. 97-232); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987); *Davis v. City of Sioux City*, 115 F.3d 1365, 1368-69 (8th Cir. 1997); *Gary v. Long*, 59 F.3d 1391, 1397-98 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995).

It is worth emphasizing that this Court in *Meritor* explicitly held that the court of appeals in that case "*erred* in concluding that employers are always automatically liable for sexual harassment by their supervisors." 477 U.S. at 72 (emphasis added). In the years since *Meritor*, the courts of appeals doubtless have employed somewhat different verbal formulations in identifying which employers are, and which employers are not, liable for "hostile work environment" harassment by supervisory employers. But that is a far cry from saying that the courts of appeals have actually reached different results in comparable cases, much less in cases like the one presented here. Given the fact-intensive nature of claims of discrimination based on a hostile work environment, it is essential to review and compare the facts of particular cases to determine whether there is any actual disagreement among the circuits. Such a comparison is conspicuously lacking in the petition.

Moreover, the very cases on which petitioner relies to establish the alleged conflict describe the governing legal standards in terms very similar to those employed by the court of appeals here. *Compare, e.g., Karibian*, 14 F.3d at 780, with the decision below, Pet. App. 8a, 10a. The court of appeals' decision proceeds directly from common-law agency principles, as prescribed by this Court in *Meritor*, and does not conflict with the outcome reached by any other court of appeals in a comparable case. There is no need for further review.

Nor is review justified by petitioners' invitation that the Court address and resolve one or more of three purported questions of first impression.

With respect to the first of these questions—whether in appropriate circumstances the sheer pervasiveness of a

hostile work environment can give rise to an inference that the employer knew or should have known about the offending conduct—the court of appeals already has acknowledged that there may be cases "in which the same level of pervasiveness can support a finding both of hostile environment and constructive notice." Pet. App. 16a n.10. Petitioner's complaint therefore is not with the court's statement of any operative legal principle but rather with the court's conclusion that on the facts of this case the mere existence of a hostile work environment did not give rise to constructive knowledge on the part of the City.

As far as the second and third questions are concerned, petitioner essentially seeks to create one or more per se rules to replace the well-established principle that issues of agency properly depend on an examination of all of the facts and circumstances involved. In particular, petitioner would have this Court establish a per se rule that an employer's failure effectively to disseminate a sexual harassment policy means that the employer will be deemed to have constructive knowledge of whatever harassment may occur, regardless of the facts or circumstances involved. Alternatively or in addition, petitioner argues for a per se rule that actual notice to any employee in any supervisory role constitutes actual notice to the employer, regardless of what level of authority the supervisor may occupy, what his duties and responsibilities are, and what, if any, relationship he may have to the alleged harassment.

Neither of these proposed per se rules is consistent with the common-law agency principles that this Court said in *Meritor* should be applied to determine when an employee should be held liable under Title VII for harassing conduct by its employees. Nor has any other court seen fit to adopt or apply any such per se rules. The mere preference of petitioner for such an approach provides no proper basis for review in this Court.

I. REVIEW IS NOT NEEDED TO RESOLVE ANY CONFLICT AMONG THE COURTS OF APPEALS.

In reaching its decision that the City should not be held liable under Title VII for Terry's and Silverman's behavior, the en banc court ruled that "Terry and Silverman were not acting within the line and scope of their employment in perpetrating their harassment against Faragher" and they "were not aided in accomplishing the harassment by the existence of any agency relationship with the City". Pet. App. 14a. This case therefore is readily reconcilable with *Karibian*, *Torres*, *Harrison*, and *Hicks*, the cases on which petitioner relies to demonstrate an alleged conflict with the decision here. Indeed, in *Torres*, one of the cases that supposedly conflicts with the decision below, the Second Circuit affirmed a grant of summary judgment in favor of the employer on grounds very similar to those applied here. 116 F.3d at 635 (plaintiff failed to allege facts showing a "nexus" between the supervisory authority and the harassment). And in *Karibian*, the earlier Second Circuit decision that petitioner also claims is inconsistent with the decision below, the court of appeals explicitly stated its holding in terms very similar to those used here:

> We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. [citations omitted]. In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers; consequently, . . . the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."

14 F.3d at 780, *quoting Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2d Cir. 1992).

To the extent that the cases do reveal any divergence among the circuits, it is only within the category of cases that does *not* include this case, namely, cases in which plaintiff is able to show that the supervisor used his actual or apparent authority to further the harassment, or was otherwise aided in accomplishing the harassment by the existence of the agency relationship. *Gary v. Long* in the D.C. Circuit was one such case. There, the harassing supervisor plainly was alleged to have used his authority over the employee as part of his harassing behavior. As the court of appeals summarized the allegations,

> Long [the supervisor] first attempted to entice Gary [the employee] into having sexual relations with him through promises that he could make her job easier. After this carrot proved unsuccessful, Long tried using a stick. He repeatedly threatened Gary with adverse employment consequences, including termination of employment, if she did not submit to his advances.

59 F.3d at 1393-94. The *Gary* court observed, however, that the employer had "an active policy against sexual harassment, . . . and that there is no claim that these procedures were not known by the employees." *Id.* at 1398. The court held that "an employer may not be held liable for a supervisor's hostile work environment if the employer is able to establish that it had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences." *Id.*

Petitioner relies on language from the Tenth Circuit in *Harrison*, 112 F.3d at 1446, for her assertion that there is tension between *Gary* and *Karibian*. *Harrison*, however,

is like *Karibian* and *Gary*, and unlike this case, in that the supervisor repeatedly used his authority to accomplish his harassment. *See Harrison*, 112 F.3d at 1440-41 (supervisor numerous times altered employee's work assignments and ordered her to accompany him to remote areas of work site where supervisor physically and verbally sexually harassed employee). The district court in *Harrison* entered judgment on the basis of a jury verdict in favor of the employer, and the court of appeals reversed and remanded for further proceedings. The court held that the district court's instructions to the jury erroneously suggested that the employer could be liable only if the jury found that the supervisor "had authority, apparent or otherwise, to harass plaintiff." *Id.* at 1449. The court also ruled that the instructions erroneously defined the term "apparent authority" and improperly omitted any mention of the possibility that the employer could be liable if the supervisor was aided in his harassment by the existence of the agency relation. *Id.* at 1450-51.

In the course of its general review of the governing law prior to announcing the actual basis for its decision, the *Harrison* court in dictum endorsed the Second Circuit's approach in *Karibian*, explaining that *Karibian* "allows an employer to be held liable, *even if a sexual harassment policy is in place and is made known to the plaintiff*, where the supervisor uses his actual or apparent authority to aid or facilitate his perpetration of the harassment." 112 F.3d at 1446 (emphasis added). To the extent, therefore, that there is any tension between *Karibian* and *Harrison*, on the one hand, and *Gary*, on the other, it concerns the question whether an employer's effective and well-publicized sexual harassment policy can protect an employer from liability when a supervisor does use his actual or apparent authority to facilitate his harassment. Here, the harassment involved no such use of the supervisors' actual or apparent authority.

The court of appeals in this case relied on *Gary* for the proposition that the term "aided" in Restatement § 219 (2)(d) should be interpreted narrowly and that it contemplates employer liability only where "the harassment is accomplished by an instrumentality of the agency or through conduct associated with the agency status." Pet. App. 13a; Pet. App. 64a, n.14. This portion of *Gary* was expressly followed by the Second Circuit in *Torres*, 116 F.3d at 635, and there are no facts in this case to suggest that Terry or Silverman used or relied on their supervisory authority as part of their harassment. The court of appeals' reliance on *Gary* for the proper interpretation of the word "aided" in the second clause of § 219(2)(d) is entirely consistent with this Court's ruling in *Meritor*, 477 U.S. at 72, that employers are not to be held automatically liable under Title VII for sexually harassing conduct by their supervisory employees. Indeed, *Harrison* itself recognized that where the harasser does not in some way utilize his supervisory authority to further his harassing behavior, employer liability cannot be predicated on the second clause of § 219(2)(d): "We emphasize, however, that this interpretation does not allow liability to attach where the harasser's agency relationship merely provided him with proximity to plaintiff." 112 F.3d at 1446. Accordingly, there is no disagreement among the courts of appeals on any point that has bearing on this case.

II. REVIEW IS NOT NEEDED TO ESTABLISH ANY NEW PER SE RULES.

Petitioner contends that review is needed to establish one or more of three possible per se grounds on which an employer allegedly should be held to have received constructive notice of unlawful harassment. Petitioner's real complaint, however, is that the en banc court applied well-established law to the facts of this case in a manner that did not favor petitioner. That is not an adequate basis for review in this Court or for the creation of new per se rules.

Firt, petitioner takes issue with the en banc court's holding that in this case Terry's and Silverman's sexual harassment was pervasive enough to constitute a hostile work environment, but not pervasive enough to charge the City with constructive knowledge of that harassment. The en banc court acknowledged that "[a] plaintiff also can prove an employer's knowledge by showing that the harassment was pervasive enough to charge the employer with constructive knowledge." Pet. App. 15a. The court ruled, however, that here the harassment was not so pervasive that the City should be charged with such knowledge:

> There may be cases in which it is difficult to draw the line where conduct becomes so pervasive that the employer should have known about it. But this is not such a case. . . . The district court did not find, nor has Faragher pointed to, any factual basis for concluding that the City should have known of their conduct. The evidence suggests that just the opposite is true.

Pet. App. 16a. *See also* Pet. App. 67a (panel opinion). The en banc court articulated the basis for its ruling as follows:

> The lifeguards were stationed at a remote location and had little contact with City officials. The harassment itself occurred intermittently over a long period of time. Faragher worked for the City mostly on a part-time and summer basis, and the district court's holding was premised upon a few, discrete instances of harassment. Another lifeguard, Kelly Evans, was a friend of Faragher's, yet the two never discussed sexual harassment and there is no evidence that Ms. Evans was otherwise aware of Terry's and Silverman's harassing behavior toward Faragher. And, as part of her duties as Recreation Superintendent, Sandy Dioli-Kumm occasionally counseled some of the lifeguards. Ewanchew came to see Dioli-Kumm to discuss work-related issues on several different occasions but never mentioned anything about sexual

> harassment or offensive words or touching by Terry or Silverman; nor is there any evidence that Dioli-Kumm was otherwise aware of such harassment.

Pet. App. 16a-17a. The court's decision on this point thus stands only for the unremarkable proposition that under the facts presented here, the harassment was not sufficiently pervasive that the City should be charged with constructive knowledge of it. That case-specific decision does not warrant further review.

Quoting from the dissent of Judge Barkett, petitioner accuses the court of "collaps[ing] the two distinct inquiries of actual knowledge and constructive knowledge into one, [effectively] requiring actual knowledge before imposing liability." Pet. 24, *quoting* Pet. App. 22a. That accusation is not justified. All of the en banc court's factual observations relate to whether the City *should have known* about the sexual harassment of petitioner. In discussing the fact that despite numerous conversations petitioner never brought Terry's and Silverman's sexual harassment to the attention of her friend Kelly Evans, who was also a female lifeguard, the en banc court was pointing out that the supervisors' behavior was not so pervasive that all of the other female lifeguards were aware of petitioner's predicament.[4] Also, in discussing the fact that Terry's superior, Recreation Superintendent Sandy Dioli-Kumm, was not told by Ewanchew of Terry's and Silverman's harassing behavior, the en banc court was pointing out that Dioli-Kumm had no reason to know of their behavior toward petitioner because during this time

[4] Similarly, the district court found that another female lifeguard, Beverly Barta, had experienced and witnessed offensive conduct on the part of Terry and Silverman, but she did not hear others complain about them. The district court assigned Barta "the highest level of credibility", and it noted that "[h]er lack of awareness of other lifeguards' complaints about Terry and Silverman's conduct casts doubt on the City's ability to be aware of such conduct." Pet. App. 84a.

no such reports had been brought to her attention by anyone at the Marine Safety Section.

The second per se rule advocated by petitioner derives from the district court's finding that the City failed to disseminate its policy against sexual harassment to its Marine Safety Section employees. Pet. App. 83a. According to petitioner, this failure should by itself impute to the City constructive notice of the harassment by Terry and Silverman. The en banc court correctly ruled, however, that "the record indicates that failure to disseminate this policy was not the reason why the City did not know about the harassment." Pet. App. 17a. Indeed, as the facts of this case demonstrate, when Faragher's co-plaintiff Ewanchew chose to complain in April 1990, she knew enough to direct her letter to the City's Director of Personnel, and that one complaint immediately led to an investigation and disciplinary action against Terry and Silverman. Moreover, although the district court found that Ewanchew "never got a copy of the sexual harassment policy during her tenure with the City" (Pet. App. 83a), the court made no such finding with respect to petitioner. In fact, petitioner declined to register any complaint even after she reviewed the City's revised sexual harassment policy in May 1990.

Petitioner's position is also contrary to all relevant legal authority. The Equal Employment Opportunity Commission's Guidelines suggest that employers adopt and disseminate a policy against sexual harassment, but they do not provide that the failure to do so effectively will create liability. In subsection (f) of 29 C.F.R. § 1604.11, the Guidelines note that an employer "should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing

methods to sensitize all concerned." The Guidelines do not say, however, that an employer's failure effectively to disseminate a sexual harassment policy inevitably will lead to a finding that the employer was constructively aware of any harassment that did occur. Indeed, in *Gary,* the D.C. Circuit stated that even a complete failure to adopt a policy against sexual harassment would not automatically give rise to a finding of liability: "[w]e do not suggest that an employer must be found liable under Title VII if it has failed to adopt [an active policy against sexual harassment]; a determination of liability will always require the application of the law of agency to the particular facts of the case." 59 F.3d at 1398.

Finally, focusing on Faragher's complaints to Gordon, petitioner argues for a per se rule that any complaint to anyone in a supervisory role should always constitute notice to the employer. The court of appeals correctly ruled, however, that a low-level supervisor, in whom the petitioner confided as a friend, who had no authority over Terry and Silverman, and who was not involved in the unlawful harassment, should not be treated as the City's agent for purposes of constructive notice.[5] Pet. App. 15a & n.9; Pet. App. 66a & n.16. *See also Kotcher,* 957 F.2d at 63-64 (rejecting plaintiff's argument that another supervisor's knowledge of a supervisor's sexual harassment should constitute notice to employer); *Torres,* 116 F.3d at 637 & n.16 (supervisors whose knowledge can be imputed to the employer include two groups: first, super-

[5] Petitioner incorrectly states (Pet. 27 n.13) that the en banc court found that Gordon was a Lieutenant. In fact, the en banc court noted that Gordon was a Lieutenant and a Training Captain. Pet. App. 3a. The district court also found that Gordon was a Lieutenant and that he later became Training Captain. Pet. App. 71a. Further, there was trial testimony that the position of Training Captain did not rank as high as Captain. Pet. App. 82a. Finally, the district court found that none of these positions, nor even the position of Chief of the Marine Safety Section, qualified as higher management for the City. Pet. App. 71a.

visors charged with a duty to protect the harassed from further harm, and, second, non-management employees charged with substantial responsibility for relaying employee complaints to management). This is consistent with applicable agency principles. Restatement (Second) of Agency § 275 cmt. a ("the principal is affected by the agent's knowledge only if the agent, in failing to impart the knowledge, has failed to act properly within the scope of his authority"). *See also id.* cmt. c. ("the agent must have a duty to reveal the information which he has"). Moreover, the district court's imputation of constructive knowledge as an alternative basis for holding the City liable was internally contradictory, and thus clearly erroneous, given the court's earlier finding that it would not "impute to the City Gordon's actual knowledge of the lifeguards' complaints regarding Terry's and Silverman's conduct . . . ." Pet. App. 84a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 14, 1997

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 97-282

In The

Supreme Court of the United States

October Term, 1997

BETH ANN FARAGHER,

Petitioner,

vs.

THE CITY OF BOCA RATON, a political subdivision of the State of Florida,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed August 9, 1997
Certiorari Granted November 20, 1997

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23. Memorandum of Decision and Order of the United States District Court for the Southern District for the Sout .ern District, Dated July 22, 1994 ..... App. 69a

24. Opinion of the United States Court of Appeals for the Eleventh Circuit, Dated April 15, 1997 ..... App. 1a

25. Opinion of the United States Court of Appeals for the Eleventh Circuit, *en banc*, Dated February 8, 1996 ..... App. 41a

US. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach Division)

CIVIL DOCKET FOR CASE # 92-CV-8010

Faragher, et al v. City of Boca Raton, et al. Assigned to Judge Shelby Highsmith Demand: $0,000 Lead Docket: None Dkt# in other court: None	Filed: 01/06/92 Jury Demand: Defendant Nature of Suit: 422 Jurisdiction: Federal Question

Cause: 42:1983 Civil Rights Act

BETH ANN FARAGHER plaintiff	William Robert Amlong [COR LD NTC] Amlong & Amlong 500 N.E. 4th Street 2nd Floor Fort Lauderdale, FL 33301-1154 954-462-1983
NANCY EWANCHEW plaintiff	William Robert Amlong (See above) [CORD LD NTC]
v.	
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RELEVANT DOCKET ENTRIES

1/6/92	1	COMPLAINT filed; FILING FEE $120.00 receipt #50323 TEB A-7 (msf) [Entry date 01/15/92]
3/16/92	12	MOTION by City of Boca Raton and Bill Terry to dismiss complaint and/or to strike [1-1] complaint (vr) [Entry date 03/25/92]
3/17/92	13	ANSWER to Complaint by Bill Terry (Attorneys Peter Joseph Hurtgen and Cathy Mattson Stutin), (vr) [Entry date 03/25/92]
3/30/92	18	PARTIAL ANSWER to Complaint by David Silverman (Attorney), (hr) [Entry date 04/06/92]
3/30/92	19	MOTION by David Silverman to dismiss complaint, to strike claims for punitive damages (hr) [Entry

date 04/06/92]

3/30/92	20	MEMORANDUM by David Silverman in support of [19-1] motion to dismiss complaint, [19-2] motion to strike claims for punitive damages (hr) [Entry date 04/06/92]
4/15/92	24	RESPONSE by Beth Ann Faragher, Nancy Ewanchew to [19-1] motion to dismiss complaint, [19-2] motion to strike claims for punitive damages (mg) [Entry date 04/23/92]
4/24/92	27	RESPONSE by City of Boca Raton, Bill Terry in opposition to [24-1] motion response (mg) [Entry date 05/05/92]
4/30/92	29	REPLY by Beth Ann Faragher to response to [19-1], motion to dismiss complaint [19-2] motion to strike claims for punitive damages (mg) [Entry date 05/08/92]
8/13/92	38	ORDER granting [19-1] motion to dismiss complaint as to count I, Terry's and Silverman's motion to dismiss counts I granted, and count I, as it attempts to assert a cause of action against Terry and Silverman is dismissed with prejudice. Denied [19-2] City's motion to strike claim for punitive damages: City's motion to dismiss complaint as to counts II,

III, IV is granted and counts II, III and IV are dismissed. Terry's motion to dismiss counts VI and IX are dismissed without prejudice. Terry's and Silverman motions to dismiss counts VII and X are dismissed without prejudice. City's motion to dismiss counts XI and XII is granted (signed by Judge Shelby Highsmith on 8/13/92) CCAP (mg) [Entry date 08/18/92]

9/4/92	--	PROPOSED first amended complaint (mg) [Entry dated 09/10/92]
9/21/92	41	MEMORANDUM by City of Boca Raton, Bill Terry, David Silverman in support of [19-2] motion to strike claims for punitive damages (mg) [Entry date 09/22/92]
9/21/92	43	ANSWER by City of Boca Raton, Bill Terry, David Silverman (Attorney Peter Joseph Hurtgen, Cathy Mattson Stutin) to amended complaint (mg) [Entry date 09/22/92]
9/23/92	44	ANSWER by David Silverman to amended complaint (mg) [Entry date 09/24/92]
10/22/92	52	MEMORANDUM by Beth Ann Faragher, Nancy Ewanchew in opposition to [19-2] motion to strike

		claims for punitive damages (mg) [Entry date 10/26/92]
10/27/92	53	ANSWER by Bill Terry to amended complaint; jury demand (mg) [Entry date 10/29/92]
11/2/92	54	REPLY by City of Boca Raton in opposition to [12-2] motion to strike [1-1] complaint (mg) [Entry date 11/05/92]
11/23/92	55	ORDER denying motion by City of Boca Raton to strike claim (signed by Judge Shelby Highsmith on 11/20/92) CCAP (mg) [Entry dated 11/25/92]
6/24/93	63	MOTION with memorandum in support by David Silverman in partial summary judgment as to Nancy Ewanchew (mg) [Entry date 06/25/93]
7/12/93	64	RESPONSE by Nancy Ewanchew to [63-1] motion for partial summary judgment as to Nancy Ewanchew (mg) [entry date 07/14/93]
7/23/93	65	MOTION by Beth Ann Faragher, Nancy Ewanchew for leave to file 2nd amended complaint (copy attached to motion) (hr) [Entry date 07/26/93]
7/30/93	66	MEMORANDUM by David

		Silverman in opposition to [65-1] motion for leave to file 2nd amended complaint (copy attached to motion) (hr) [Entry date 08/03/93]
8/2/93	67	RESPONSE by City of Boca Raton, David Silverman to [65-1] motion for leave to file 2nd Amended complaint (copy attached to motion) (hr) [Entry date 08/04/93]
8/9/93	68	NOTICE of withdrawal of motion for leave to leave amend by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 08/11/93]
8/9/'93	--	Deadline updated; withdrawing [65-1] motion for leave to file 2nd amended complaint (copy attached to motion) (mg) [Entry date 08/11/93]
8/12/93	70	ORDER denying [65-1] motion for leave to file 2nd amended complaint (copy attached to motion), granting [63-1] motion for partial summary judgment as to Nancy Ewanchew (signed by Judge Shelby Highsmith on 8/12/93) CCAP (mg) [Entry date 08/13/93]
8/13/93	71	ORDER, set status conference for 9:00 9/9/93 before Judge Shelby Highsmith, sta [sic] set State report due on 9/7/93 (signed by Judge

		Shelby Highsmith on 8/13/93) CCAP (mg) [Entry date 08/17/93]
8/31/93	74	Motion by David Silverman for sanctions against plaintiffs and/or attorneys (mg) [Entry date 09/02/93]
9/3/93	75	JOINT STATUS REPORT by Beth Ann Faragher, Nancy Ewanchew, City of Boca Raton, Bill Terry and David Silverman (mg) [Entry date 09/07/93]
9/8/93	76	Minute entry for proceeding held before Judge Shelby Highsmith on 9/9/93 denying [74-1] motion for sanctions against plaintiffs and/or attorneys - schedule announced (mg) [Entry date 09/10/93]
9/14/93	77	ORDER referring case to mediation. 15 days to appoint mediator (signed by Judge Shelby Highsmith on 9/14/93) CCAP (mg) [entry date 09/15/93]
9/14/93	78	ORDER setting Deadline for filing of all motions by 5/9/94 Calendar call set for 12:00 6/10/94 Pretrial Stipulation due on or before 5/23/94 Jury Trial set for 9:00 6/13/94 Memos of law due on or before 5/9/94 Discovery cutoff 4/25/94; (signed by Judge Shelby Highsmith on 9/14/93) CCAP (mg)

		[Entry date 09/15/93]
9/17/93	79	CONCISE Statement of undisputed material fact by City of Boca Raton (mg) [Entry date 09/21/93]
9/17/93	80	MOTION by City of Boca Raton, Bill Terry, David Silverman for partial summary judgment (mg) [Entry date 09/21/93]
9/17/93	81	MEMORANDUM by City of Boca Raton, Bill Terry, David Silverman in support of [80-1] motion for partial summary judgment (mg) [Entry date 09/21/93]
9/17/93	82	NOTICE of filing deposition experts [sic] and affidavits (attached) by City of Boca Raton (mg) [Entry date 09/21/93]
10/6/93	84	Letter MOTION by Beth Ann Faragher, Nancy Ewanchew to appoint mediator (mg) [Entry date 10/12/93]
10/15/93	86	CLERK's appointment of Martin Soll as Mediator granting [84-1] motion to appoint Mediator (mg) [Entry date 10/20/93]
12/21/93	99	MOTION by City of Boca Raton, Bill Terry, David Silverman for partial summary judgment (mg) [Entry date 12/22/93]

12/21/93	100	NOTICE of filing deposition excerpts and affidavit (exhibits attached) by City of Boca Raton (mg) [Entry date 12/22/93]
12/21/93	101	MEMORANDUM by City of Boca Raton, Bill Terry, David Silverman in support of [99-1] motion for partial summary judgment (mg) [Entry date 12/22/93]
12/21/93	102	CONCISE statement of undisputed material facts by City of Boca Raton (mg) [Entry date 12/22/93]
1/11/94	106	RESPONSE by Beth Ann Faragher, Nancy Ewanchew to [99-1] motion for partial summary judgment (mg) [Entry date 01/12/94]
1/11/94	107	NOTICE of filing deposition excerpts in support of their response to defendant's motion for partial summary judgment by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 01/12/94]
1/14/94	111	NOTICE of filing deposition of Richard Bender, Beth A. Faragher, Nancy Ewanchew, and Kelly Evans (attached) by City of Boca Raton (mg) [Entry date 01/18/94]
1/14/94	112	REPLY by City of Boca Raton to response to [99-1] motion for partial summary judgment (mg) [Entry

		date 01/18/94]
1/14/94	113	NOTICE of filing additional deposition testimony pages (attached) by Beth Ann Faragher (mg) [Entry date 01/18/94]
2/9/94	115	REPORT of Mediation that: no agreement was reached (mg) [entry date 02/10/94]
3/21/94	116	DISCLOSURE OF EXPERT TESTIMONY by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 03/24/94]
3/28/94	117	NOTICE of supplemental authority by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 03/29/94]
3/29/94	118	Witness list by Bill Terry (mg) [Entry date 03/30/94]
3/30/94	119	Witness list by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 03/31/94]
3/30/94	120	Witness list by David Silverman (mg) [Entry date 03/31/94]
4/26/94	124	ORDER granting in part VI and VII, denying in part as to count I [99-1] motion for partial summary judgment. The motion is denied in all other respects (signed by Judge

Shelby Highsmith on 4/26/94) CCAP (mg) [Entry date 04/29/94]

4/29/94 125 MOTION by David Silverman for summary judgment (mg) [Entry date 05/03/94]

4/29/94 126 MEMORANDUM by David Silverman in support of [125-1] motion for summary judgment (mg) [Entry date 05/03/94]

4/29/94 127 Statement of material facts as to which there is no genuine issue to be tried by David Silverman (mg) [Entry date 05/03/94]

5/9/94 128 MOTION by City of Boca Raton for rule 35 mental examination of Nancy Ewanchew (mg) [Entry date 05/10/94]

5/23/94 133 NOTICE of Pendency of Motion by David Silverman re: [125-1] motion for summary judgment (mg) [Entry date 05/24/94]

5/31/94 137 ORDER granting [128-1] motion for rule 35 mental examination of Nancy Ewanchew (signed by Judge Shelby Highsmith on 5/27/94) CCAP (mg) [Entry date 06/06/94]

5/31/94 138 JOINT PRETRIAL STIPULATION by Beth Ann Faragher, Nancy Ewanchew, City of Boca Raton, Bill

Terry, David Silverman (mg) [Entry date 06/06/94]

6/2/94 139 RESPONSE by Beth Ann Faragher, Nancy Ewanchew to [125-1] motion for summary judgment (exhibits attached) (mg) [Entry date 06/06/94]

6/6/94 140 Proposed Findings of Fact and Conclusions of Law by David Silverman (dr) [Entry date 06/07/94]

6/6/94 141 Proposed Findings of Fact and Conclusion of Law by City of Boca Raton (mg) [Entry date 06/08/94]

6/6/94 142 NOTICE OF FILING Proposed Findings of Fact and Conclusions of Law and final judgment by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 06/08/94]

6/6/94 143 PRE-TRIAL Proposed Findings of Fact and Conclusions of Law by Bill Terry (mg) [Entry date 06/08/94]

6/8/94 144 REQUEST for Production of originals at trial by City of Boca Raton (mg) [Entry date 06/09/94]

6/96/94 145 Certificate of service of proposed findings of fact and conclusions of law by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date

06/10/94]

6/10/94	146	Minute entry for proceeding held before Judge Shelby Highsmith on 6/10/94; CALENDAR CALL - case on stand by for second of trial period (mg) [Entry date 06/13/94]
6/10/94	--	Calendar call held (mg) [Entry date 06/13/94]
6/10/94	147	ORDER denying [125-1] motion for summary judgment as to counts II and III (signed by Judge Shelby Highsmith on 6/10/94) CCAP (mg) [Entry date 06/13/94]
6/10/94	148	DESIGNATION OF DEPOSITION EXCERPTS by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 06/13/94]
6/16/94	150	REQUEST for rule 35 report by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 06/20/94]
6/17/94	149	NOTICE OF FILING AMENDMENT to exhibit list by Beth Ann Faragher, Nancy Ewanchew (mg)
6/20/94	151	RESPONSE by City of Boca Raton in opposition to motion in limine (dr) [Entry date 06/22/94]
6/22/94	152	Minute entry for proceeding held before Judge Shelby Highsmith on

6/22/94: Non-JURI [sic] TRIAL DAY 2 - continued to 6/23/94 (mg) [Entry date 06/28/94]

6/22/94	--	Bench trial held (mg) [Entry date 06/28/94]
6/23/94	153	NOTICE of filing designation of deposition excerpts by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 06/28/94]
6/24/94	--	Bench trial held (mg) [Entry date 06/28/94]
6/24/95	155	Minute entry for proceeding held before Judge Shelby Highsmith on 6/23/94: NON-JURY TRIAL DAY 3 - continued to 6/24/94 (mg) [Entry date 06/28/94]
6/27/94	154	Minute entry for proceeding before Judge Shelby Highsmith on 6/24/94: NON-JURY TRIAL DAY 4 - continued to 6/27/94 (mg) [Entry date 06/28/94]
6/29/94	156	Proposed Findings of Fact and Conclusion of Law by David Silverman (mg) [Entry date 06/30/94]
6/29/94	157	POST trial memorandum by Bill Terry (mg) [Entry date 07/05/94]
6/30/94	158	ORDER, that Gail Nye shall appear

		on 7/22/94 at 10:00 to show cause for her failure to comply with subpoena (signed by Judge Shelby Highsmith on 6/30/94) CCAP (mg) [Entry date 07/05/94]
6/30/94	159	SUPPLEMENT by City of Boca Raton to: [141-1] proposed findings of fact (mg) [Entry date 07/05/94]
7/1/94	160	PRETRIAL MEMORANDUM by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 07/06/94]
7/13/94	161	NOTICE of filing plaintiff's exhibit list, defendant's exhibit list, plaintiff's exhibit 6K, L, and 22 (attached) filed by Law Clerk (mg) [Entry date 07/14/94]
7/21/94	--	Bench trial held (mg) [Entry date 08/01/94]
7/22/94	162	Minute entry for proceeding held before Judge Shelby Highsmith on 7/22/94; RULE show cause - for failure to comply with subpoena commanding to testify at trial - rule discharged (mg) [Entry date 07/25/94]
7/22/94	163	NOTICE of filing exhibits A, A1, B, C and D; admitted at the hearing on rule to show cause on 7/22/94 (attached) (mg) [Entry date

		07/25/94]
7/22/94	164	NOTICE of filing of deposition of Gaile [sic] Nye, Kelly Evans, Pat McGowan, Bill Terry, Richard Bender, David Silverman (attached) (mg) [Entry date 07/25/94]
7/22/94	165	JUDGMENT for Beth Ann Faragher, Nancy Ewanchew shall recover the summ [sic] of $10,000 in compensatory damages; $500.00 in punitive damages; $1.00 in nominal damages against Bill Terry (see order for more specification) (signed by Judge Shelby Highsmith on 7/22/94) CCAP/M (mg) [Entry date 07/25/94] [Edit date 08/18/94]
7/22/94	--	Case closed (mg) [Entry date 07/25/94]
7/22/94	166	FINDINGS OF FACT AND CONCLUSION OF LAW (signed by Judge Shelby Highsmith on 7/22/94) CCAP (mg) [Entry date 08/01/94]
7/22/94	167	Minute entry for proceeding held before Judge Shelby Highsmith on 7/21/94: BENCH TRIAL Day 1 - continued to 6/22/94 (mg) [Entry date 08/01/94]
7/29/94	168	Minute entry for proceeding held before Judge Shelby Highsmith on

		6/27/94: BENCH TRIAL DAY 5 - trial concluded (mg) [Entry date 08/01/94]
8/5/94	169	MOTION with memorandum in support by Beth Ann Faragher, Nancy Ewanchew for attorney fees and litigation expenses (mg) [Entry date 08/08/94]
8/8/94	170	NOTICE of intent to move for costs by City of Boca Raton (mg) [Entry date 08/09/94]
8/16/94	171	NOTICE OF APPEAL by Beth Ann Faragher, Nancy Ewanchew of [165-1] judgment order. EOD Date: 7/25/94; Filing Fee: $105.00; Receipt #: 640210; Copies to USCA and Counsel of Record. (Tb) [Entry date 08/18/94] [Edit date 08/18/94]
8/16/94	--	Certified copies of Notice of Appeal, Docket, and Order under appeal to USCA: [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher (tb) [Entry date 08/18/94]
8/22/94	172	VERIFIED MOTION by City of Boca Raton for attorneys fees (mg) [Entry date 08/23/94]
8/22/94	173	MEMORANDUM by City of Boca Raton in support of [173-1] motion to Tax Costs (mg) [Entry date

		08/23/94]
8/22/94	174	VERIFIED Motion with memorandum in support by Bill Terry for attorney fees, to Tax Costs against Ewanchew (mg) [Entry date 08/23/94]
8/22/94	175	MOTION by Beth Ann Faragher, Nancy Ewanchew for attorney fees (mg) [Entry date 08/23/94]
8/22/94	176	MEMORANDUM by Beth Ann Faragher, Nancy Ewanchew in support of [175-1] motion for attorneys fees (mg) [Entry date 08/23/94]
8/22/94	177	UNSWORN DECLARATION of Elizabeth du Fresne by Beth Ann Faragher, Nancy Ewanchew RE: [175-1] motion for attorney fees, and litigation expenses (mg) [Entry date 08/23/94]
8/22/94	178	UNSWORN DECLARATION of Thomas E. Scott by Beth Ann Faragher, Nancy Ewanchew RE: [175-1] motion for attorney fees, litigation expenses (mg) [Entry date 08/23/94]
8/22/94	179	UNSWORN DECLARATION of William R. Amlong by Beth Ann Faragher, Nancy Ewanchew Re: [175-1] motion for attorney fees

(mg) [Entry date 08/23/94]

8/26/94	181	NOTICE OF CROSS APPEAL by City of Boca Raton of [165-1] judgment order. EOD Date: 7/25/94; Filing Fee: FEE NOT PAID Copies to USCA and Counsel for Record. (cs) [Entry date 08/30/94] [Edit date 08/30/94]
8/29/94	--	NOTICE of Receipt of Transmittal Letter from USCA Re: [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher USCA NUMBER: 94-4878 (ps) [Entry date 09/09/94]
8/30/94	--	Certified copies of Notice of Appeal, Docket, and Order under appeal to USCA: [181-1] appeal by City of Boca Raton (cs)
9/1/94	185	NOTICE of counsel's having conferred pursuant to rule 7.3 by Beth Ann Faragher, Nancy Ewanchew (mg) [Entry date 09/02/94]
9/6/94	186	ORDER releasing trial exhibits to respective parties. (signed by Judge Shelby Highsmith on 9/22/94) CCAP (mg) [Entry date 09/08/94]
9/9/94	--	NOTICE of receipt of Transmittal Letter from USCA Re: [181-1] appeal by City of Boca Raton USCA NUMBER: 94-4878 (ps) [Entry date

09/22/94]

9/15/94	189	MEMORANDUM by City of Boca Raton, Bill Terry, David Silverman in opposition to [175-1] motion for attorney fees (mg) [Entry date 09/16/94]
9/16/94	190	MEMORANDUM by David Silverman in opposition to [175-1] motion for attorneys fees and litigation expenses (mg) [Entry date 09/19/94]
9/16/94	191	RESPONSE by Beth Ann Faragher, Nancy Ewanchew to [175-1] motion for attorney fees, [174-1] motion for attorney fees (mg) [Entry date 09/19/94]
9/23/94	192	MEMORANDUM by Bill Terry in opposition to verified [175-1] motion for attorney fees (mg) [Entry date 09/26/94]
9/26/94	193	REPLY memorandum of law by Beth Ann Faragher, Nancy Ewanchew in support of [175-1] motion for attorney fees and litigation expenses (mg) [Entry date 09/27/94] [Edit date 07/20/95]
9/26/94	194	UNSWORN DECLARATION of Bonnie M. Catalano by Beth Ann Faragher, Nancy Ewanchew in support of [175-1] motion for

attorney fees and litigation expenses (mg) [Entry date 09/27/94]

9/26/94 195 SUPPLEMENT by Beth Ann Faragher, Nancy Ewanchew to: [175-1] motion for attorney fees (mg) [Entry date 09/27/94]

9/26/94 196 SUPPLEMENTAL unsworn declaration of William R. Amlong by Beth Ann Faragher, Nancy Ewanchew to: [194-1] unsworn declaration (mg) [Entry date 09/27/94]

9/26/94 197 REPLY by City of Boca Raton to response to [172-1] motion for attorney fees (mg) [Entry date 09/27/94]

9/26/94 198 SUPPLEMENTAL by City of Boca Raton to: [172-1] motion for attorney fees (mg) [Entry date 09/27/94]

9/26/94 199 SUPPLEMENTAL AFFIDAVIT by City of Boca Raton to: [172-1] motion for attorney fees (mg) [Entry date 09/27/94]

10/3/94 200 RESPONSE by Beth Ann Faragher, Nancy Ewanchew in opposition to [199-1] supplement to (mg) [Entry date 10/04/94]

10/4/94 201 RESPONSE by City of Boca Raton to

[175-1] motion for attorney fees (dr) [Entry date 10/05/94]

10/4/94 201 REPLY by City of Boca Raton to response to [172-1] motion for attorney fees (dr) [Entry date 10/05/94]

10/12/94 202 DESIGNATION by Beth Ann Faragher, Nancy Ewanchew of additional parts to be included in record on appeal (ps) [Entry date 10/19/94]

10/31/94 203 TRANSCRIPT of trial excerpts (Volume 2) filed [181-1] appeal by City of Boca Raton for dates of 6/23/94, pages 1-98 (ps) [Entry date 11/02/94]

10/31/94 204 TRANSCRIPT of trial excerpts (Volume 3) filed [181-1] appeal by City of Boca Raton for dates of 6/23/94, pages 99-188 (ps) [Entry date 11/02/94]

11/2/94 -- Appeal Information Sheet re: [181-1] appeal by City of Boca Raton; Transcript of trial due 10/31/94; (ps)

11/8/94 205 MOTION by Beth Ann Faragher, Nancy Ewanchew to compel ordering of complete transcripts for appeal (mg) [Entry date 11/14/94]

11/23/94	206	RESPONSE by City of Boca Raton to [205-1] motion to compel ordering of complete transcripts for appeal (dr) [Entry date 11/25/94]
12/5/94	207	REPLY by Beth Ann Faragher, Nancy Ewanchew to response to [205-1] motion to compel ordering of complete transcripts for appeal (mg) [Entry date 12/08/94]
12/19/94	208	TRANSCRIPT of trial (partial) filed [181-1] appeal by City of Boca Raton for dates of 6/22/94, pages 1-81 (ps) [Entry date 12/20/94]
12/20/94	209	ORDER denying [205-1] motion to compel ordering of complete transcripts for appeal (signed by Judge Shelby Highsmith on 12/20/94) CCAP (mg) [Entry date 12/21/94]
1/5/95	210	ORDER setting motion hearing on [175-1] motion for attorney fees by Nancy Ewanchew, Beth Ann Faragher for 10:00 1/27/95, setting motion hearing on [174-1] motion for attorney fees by Bill Terry for 10:00 1/27/95, setting motion hearing on [174-2] motion to Tax Costs by Bill Terry for 10:00 1/27/95, setting motion hearing on [173-1] motion to Tax Costs by City of Boca Raton for 10:00 1/27/95, setting for hearing on [172-1]

		motion for attorney fees by City of Boca Raton for 10:00 1/27/95, setting motion hearing on [169-1] motion for attorney fees and litigation expenses by Nancy Ewanchew, Beth Ann Faragher for 10:00 1/27/95 (signed by Judge Shelby Highsmith on 1/5/95) CCAP (mg) [Entry date 01/10/95]
1/23/95	--	Certificate of readiness transmitted to USCA Re: [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher USCA NUMBER: 94-4878 (ps)
1/23/95	--	Transmitted record on appeal consisting of 6 volumes of pleadings and 3 volumes of transcripts to U.S. Court of Appeals (Miami Office): [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher (USCA #94-4878) (ps)
2/2/95	212	ORDER setting motion hearing on [175-1] motion for attorney fees by Nancy Ewanchew, Beth Ann Faragher for 2:00 2/10/95, setting motion hearing on [174-1] motion for attorney fees by Bill Terry for 2:00 2/10/95 (signed by Magistrate Stephen T. Brown on 2/2/95) CCAP (mg) [Entry date 02/06/95]

2/21/95	--	Acknowledge of reciept by U.S.C.A. of: Certificate of readiness U.S.C.A. # 94-4878 (vp) [Entry date 02/23/95]
3/2/95	--	Certificate of readiness of 1st supplemental record on appeal transmitted to USCA Re: [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher USCA NUMBER: 94-4878 (ps)
3/2/95	--	Transmitted 1st supplemental record on appeal consisting of 1 volume of pleading to U.S. Court of Appeals (Miami Office): [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher (USCA #94-4878) (ps)
3/2/95	217	MEMORANDUM (copy) by City of Boca Raton, Bill Terry, David Silverman in support of [19-1] motion to dismiss complaint, [19-2] motion to strike claims for punitive damages, [12-1] motion to dismiss complaint, [12-2] motion to strike [1-1] complaint (mg) [Entry date 03/07/95]
3/2/95	218	MOTION by City of Boca Raton to supplement the record on appeal with document (Memorandum of Law in support of Defendant's

		Motion to Dismiss and/or Strike) (ps) [Entry date 03/07/95]
3/3/95	219	ORDER granting [218-1] motion to supplement the record on appeal with document (Memorandum of Law in Support of Defendant's Motion to Dismiss and/or Strike) (signed by Judge Shelby Highsmith on 3/3/95) CCAP (ps) [Entry date 03/07/95]
3/8/95	--	Certificate of readiness of 2nd Supplemental Record on Appeal transmitted to USCA Re: [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher USCA NUMBER: 94-4878 (ps) [Entry date 03/09/95]
3/8/95	--	Transmitted 2nd supplemental record on appeal consisting of 1 volume of pleadings to U.S. Court of Appeals (Miami Office): [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher (USCA #94-4878) (ps) [Entry date 03/09/95]
3/8/95	220	REPORT AND RECOMMENDATIONS of Magistrate Stephen T. Brown Recommends: Plaintiff's appropriate lodestar to be, after considering reasonable hourly rates and reasonable hours, the sum of $77,375.00. It is recommended that

the lodestar by reduced by 33% to reflect the mixed results obtained in this case. Finally it is recommended that Plaintiff be awarded expenses in the sum of $8,169.42, [175-1] motion for attorney fees, [174-1] motion for attorney fees, [174-2] motion to Tax Costs; Signature date: 3/7/95 Motion no longer referred Objections to R and R due by 3/18/95 CCAP (mg) [Entry date 03/10/95]

3/14/95	--	ACKNOWLEDGE of receipt by U.S.C.A. of: Certificate of Readiness of 1st supplemental record on appeal U.S.C.A. # 94-4878 (ps) [Entry date 03/16/95]
3/17/95	221	OBJECTION by City of Boca Raton to [220-1] report and recommendations (mg) [Entry date 03/20/95]
3/28/95	222	ORDER granting [175-1] motion for attorney fees, denying [174-1] motion for attorney fees, denying [174-2] motion to Tax Costs, denying [173-1] motion to Tax Costs, denying [172-1] motion for attorney fees, granting [169-1] motion for attorney fees and litigation expenses. Beth Ann Faragher shall recover $51,841.25 in attorney's fees from City of Boca Raton, Bill Terry and David Silverman, jointly

and severally. Plaintiffs shall recover $8,169.42 in costs with on-half of the total apportioned to each plaintiff. Costs award $4,084.71 shall be taxed against City of Boca Ration, Bill Terry, and David Silverman. (signed by Judge Shelby Highsmith on 3/27/95) CCAP (mg) [Entry date 03/31/95] [Edit date 03/31/95]

4/5/95	224	MOTION by City of Boca Raton for order allowing additional trial testimony, and to supplement record on appeal with transcript (vp) [Entry date 04/12/95]
4/7/95	223	TRANSCRIPT of excerpt from trial filed [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher for dates of 6/21/94, pages 1-22 (ps) [Entry date 04/11/95]
4/11/95	--	Certificate of readiness of 3rd Supplemental Record on Appeal transmitted to USCA Re: [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher USCA NUMBER: 94-4878 (ps)
4/11/95	--	Transmitted 3rd supplemental record on appeal consisting of 1 volume of transcripts to U.S. Court of Appeals (Miami Office): [181-1]

		appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher (USCA #94-4878) (ps)
4/11/95	--	Supplemental Appeal Information Sheet re: [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher; Transcript of trial testimony due 5/10/95; (vp) [Entry date 04/13/95]
4/11/95	--	ACKNOWLEDGMENT of receipt by U.S.C.A. of: 2nd Supplemental Certificate of Readiness U.S.C.A. #94-4878 (ps) [Entry date 04/14/95]
4/12/95	225	NOTICE OF APPEAL by City of Boca Raton of [221-1] order. EOD Date: 3/31/95; Filing Fee: $105.00; Receipt #647754; Copies to USCA and Counsel of Record. (vp) [Entry date 04/13/95]
4/18/95	226	TRANSCRIPT of Direct Testimony of Beverly Barta (Volume 2) filed [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher for dates of 6/23/94, pages 1-6 (ps) [Entry date 04/21/95]
4/21/95	--	Appeal Information Sheet re: [225-1] appeal by City of Boca Raton. No transcript requested. Appeal Record due on 5/6/95 (vp) [Entry date 04/24/95]

4/24/95	227	ORDER granting [224-1] motion for order allowing additional trial testimony, granting [224-2] motion to supplement record on appeal with transcript (signed by Judge Shelby Highsmith on 4/24/95) CCAP (vp) [Entry date 05/02/95]
4/26/95	--	NOTICE of Receipt of Transmittal Letter from USCA Re: [225-1] appeal by City of Boca Raton USCA NUMBER: 95-4495 (ps) [Entry date 04/27/95]
5/1/95	--	ACKNOWLEDGMENT of receipt by U.S.C.A. of: 3rd Supplemental Certificate of Readiness U.S.C.A. #94-4878 (ps) [Entry date 05/05/95]
7/19/95	--	Certificate of readiness of 4th supplemental record on appeal transmitted to USCA Re: [181-1] by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher USCA NUMBER: 94-4878 (ps) [Entry date 07/20/95]
7/19/95	--	Transmitted 4th supplemental record on appeal consisting of 1 volume of transcript to U.S. Court of Appeals (Miami Office): [181-1] appeal by City of Boca Raton, [171-1] appeal by Nancy Ewanchew, Beth Ann Faragher (USCA #94-4878) (ps) [Entry date 07/20/95]

7-20-95	--	Certificate of readiness transmitted to USCA Re: [225-1] appeal by City of Boca Raton USCA NUMBER: 95-4496 (ps)
7/20/95	--	Transmitted record on appeal consisting of 2 volumes of pleadings to U.S. Court of Appeals (Miami Office): [225-1] appeal by City of Boca Raton (USCA #95-4496) (ps)
7/28/95	--	ACKNOWLEDGMENT of receipt by U.S.C.A. of: Certificate of Readiness U.S.C.A. # 95-4496 (ps) [Entry date 08/08/95]
7/28/95	--	ACKNOWLEDGMENT of receipt of U.S.C.A. of: Certificate of Readiness of 4th supplemental record on appeal U.S.C.A. # 94-4878 (ps) [Entry date 08/08/95]
1/10/96	228	TRANSCRIPT of partial trial (Testimony of Beth Faragher, Ms. Bonner, and Ms. Buhr) filed [181-1] appeal by City of Boca Raton, [171-1] appeal by Beth Ann Faragher, Nancy Ewanchew for dates of 6/22/94, pages 1-125 (ps) [Entry date 01/16/96]
1/18/96	--	Certificate of readiness of 5th supplemental record on appeal transmitted to USCA Re: [181-1] appeal by City of Boca Raton, [171-1] appeal by Beth Ann Faragher, Nancy

		Ewanchew USCA NUMBER: 94-4878 (ps)
1/18/96	--	Transmitted 5th supplemental record on appeal consisting of 1 volume of transcripts to U.S. Court of Appeals (Atlanta): [181-1] appeal by City of Boca Raton, [171-1] appeal by Beth Ann Faragher, Nancy Ewanchew (USCA #94-4878) (ps)
1/30/96	--	ACKNOWLEDGMENT of receipt by U.S.C.A. of: Certificate of Readiness of 5th supplemental record on appeal U.S.C.A. #94-4878 (ps) [Entry date 02/02/96]
5/21/97	231	MANDATE OF USCA (certified copy) vacating Opinion entered on February 8, 1996 [181-1] appeal, affirming judgement/order [171-1] appeal of the District Court. Mandate Issued Dated: 05/20/97; USCA Appeal # 94-4878; to Judge. (mlw) [Entry date 07/24/97]
6/13/97	229	MANDATE OF USCA (certified copy) Beth Ann Faragher & Nancy Ewanchew Re: [181]; City of Boca Raton Re: [171] affirming in part and reversing in part, judgment/order Mandate Issued Dated: 5/20/97; USCA Appeal; #: 94-4878; Copy to Judge. (Mlw) [Entry date 06/23/97] [Edit date 06/23/97]

6/13/97	230	Bill of Costs for City of Boca Raton against Nancy Ewanchew, Beth Ann Faragher in the amount of $103.68 (mlw) [Entry date 06/23/97]
6/13/97	--	Record on appeal returned from U.S. Court of Appeals: Consisting of fourteen volumes including five supplemental volumes. [181-1] appeal by City of Boca Raton, [171-1] appeal by Beth Ann Faragher, Nancy Ewanchew USCA #: 94-4878 (mlw) [Entry date 06/23/97]
6/13/97	--	ACKNOWLEDGMENT of receipt by U.S.C.A. of: bill of cost and original record on appeal consisting of 14 volumes and 5 supplemental volumes. U.S.C.A. #94-4878 (mlw) [Entry date 07/22/97]
7/23/97	232	ORDER of dismissal from USCA (certified copy) dismissing [225-1] appeal as moot USCA #: 95-4496 USCA Order Date: 07/08/97 (df) [Entry date 07/29/97]
12/9/97	233	Transcript filed re: trial transcript day two Date: 6/22/94 Before Judge: Shelby Highsmith Volume No.: 1 of 1 Number of pages: 1-255 (ra)[Entry date 12/12/97]
12/12/97	234	Transcript filed re: Jury Trial Date: 6/23/94 Before Judge: Shelby Highsmith Volume No.: 2 Number

		of pages: 230 (vp) [Entry date 12/17/97]
12/12/97	235	Transcript filed re: Jury Trial Date: 6/24/94 Before Judge: Shelby Highsmith Volume No.: 3 Number of Pages 257 (vp) [Entry date 12/17/97]
12/12/97	236	Transcript filed re: Jury Trial Date: 6/21/94 Before Judge Shelby Highsmith Volume No.1 Number of pages: 165 (vp) [Entry date 12/17/97]
12/12/97	237	Transcript filed re: Jury Trial Date: 6/27/94 Before Judge: Shelby Highsmith Volume No. 4 Number of pages: 57 (vp) [Entry date 12/17/97]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO: 94-4878

RELEVANT DOCKET EVENTS

OPENING BRIEFS

3/31/95	Opening brief of appellant (BF)
3/31/95	Opening records of excerpts of appellant (BF)
5/1/95	Opening brief of X-appellant (BT)

5/9/95	Opening brief of X-appellant (COBR)
6/16/95	Opening brief of X-appellee (BF)
7/5/95	Opening reply brief of appellant (COBR)

EN BANC BRIEFS

8/5/96	En Banc brief of appellant
9/9/96	En Banc brief of appellee (COBR)
9/30/96	En Banc reply brief of appellant
8/5/96	En Banc Amicus Curiae brief (EEOC)
9/11/96	En Banc brief of appellee (BT)

EN BANC DOCKET ENTRIES

10/23/96	Filing supplemental authority of appellant/X-appellee

OTHER MOTIONS & ORDERS

2/26/96	Filing appellee's motion to vacate district court order awarding costs and attorney's fees against defendant City of Boca Raton and incorporated memo of law. /ols (submitted under case #95-4496)
3/4/96	Filing appellant's response to motion to vacate. /ols (submitted under case #95.4496)
5/13/96	Filing order that case be reheard en banc

	before all Active Judges GRANTED. The previous panel's opinion is VACATED. Senior Judge Dyer has elected to participate under Gen. Order N. 5. Slip P. 2005
7/8/97	Filing order: Appellant's "motion to vacate district order awarding costs and attorney's fees against City of Boca Raton" is GRANTED. To the extent that the district court's 3/28/95 holds Appellant responsible for payment of costs or attorney's fees to Appellees, that order is VACATED. On its own motion, and in light of this court's opinion in 94-4878, the court DISMISSES 95-4496 as moot. /ols
11/20/97	Filing U.S. Supreme Court order: . . . The petition for writ of certiorari is granted. The petition for a writ of certiorari is granted. The brief of the petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 pm, Monday, 12/29/97. The brief of respondent is to be filed with Clerk and served upon opposing counsel on or before 3 pm, Wednesday, 1/28/98. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel or or before 3 pm. Wednesday, 2/18/98. Rule 20.2 does not apply. /ols

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

BETH ANN FARAGHER
and NANCY EWANCHEW,

Case No. 92-8010-
Civ-Highsmith

Plaintiffs,

vs.

CITY OF BOCA RATON, a political subdivision of the State of Florida; BILL TERRY, individually, and DAVID SILVERMAN, individually,

Defendants.
_____/

FIRST AMENDED COMPLAINT

Plaintiffs, BETH ANN FARAGHER and NANCY EWANCHEW, sue defendants, CITY OF BOCA RATON, a political subdivision of the State of Florida, BILL TERRY, individually, and DAVID SILVERMAN, individually, and allege:

INTRODUCTION

1. This is a sexual harassment (both quid pro quo and hostile environment) brought by two female former lifeguards against their municipal employer and two supervisors of the city's lifeguard service. Both sue under the equal protection clause of the fourteenth amendment and one brings this action additionally pursuant to Title VII of the Civil Rights Act of 1964, as amended. Both

additionally seek common-law relief against the individual defendants for battery, and against the municipal employer for negligent retention and supervision of the individual defendants. Both seek compensatory damages, punitive damages against the individual defendants, costs and a reasonable attorney's fee.

JURISDICTION

2. This action arises under 42 U.S.C. §§ 1983 and 1988 and Title VII of the Civil Rights of 1964, 42 U.S.C. §§ 2000e, et seq. Jurisdiction is founded on 42 U.S.C. §§ 2000e - 5 (f) (3) and 28 U.S.C. §§ 1331 and 1343 (3) and (4). The court has jurisdiction to grant declaratory and further relief pursuant to 28 U.S.C. §§ 2201 and 2202. The court has supplemental jurisdiction over the common law tort claims pursuant to 28 U.S.C. § 1367.

3. Venue is proper in the West Palm Beach Division of the Southern District of Florida pursuant to 42 U.S.C. § 2000e-5(f) (3) and 28 U.S.C. § 1391 (b) because the claim arose there.

PARTIES

4. Plaintiffs, BETH ANN FARAGHER and NANCY EWANCHEW (hereinafter "FARAGHER" or "EWANCHEW" respectively, or "plaintiffs") at all times material was each employed as an ocean life guard by the CITY OF BOCA RATON.

5. Defendant, CITY OF BOCA RATON (hereinafter, "BOCA RATON"), a political subdivision of the State of Florida, is a Florida municipal corporation. BOCA RATON employs more than 15 persons, including

at all material times, plaintiffs FARAGHER and EWANCHEW and defendants, BILL TERRY and DAVID SILVERMAN. BOCA RATON is an employer under 42 U.S.C. § 2000e (b). At all times material, BOCA RATON knew or should have known of the sexually harassing conduct of defendants BILL TERRY and DAVID SILVERMAN because their harassment of FARAGHER and EWANCHEW was constant, overt and often done in the presence of and/or with the knowledge of other employees.

6. Defendant, BILL TERRY (hereinafter "TERRY"), at all times material was an employee of BOCA RATON and the Marine Safety Chief. He was FARAGHER's and EWANCHEW's direct supervisor, as well as being the direct supervisor of defendant, DAVID SILVERMAN. TERRY is an employer under 42 U.S.C. § 2000e(b). As to compensatory and punitive damages under 42 U.S.C. § 1983 and the common-law battery counts, TERRY is being sued by FARAGHER and EWANCHEW in his individual capacity. At all times material, TERRY was acting under color of law. He is a person under 42 U.S.C. § 1983.

7. Defendant, DAVID SILVERMAN (hereinafter "SILVERMAN"), at all times material was an employee of BOCA RATON as a Marine Safety Captain or Marine Safety Lieutenant. SILVERMAN was the supervisor of FARAGHER and EWANCHEW. SILVERMAN is an employer under 42 U.S.C. § 2000e(b). As to compensatory and punitive damages under 42 U.S.C. § 1983 and the common-law battery counts, SILVERMAN is being sued by FARAGHER and EWANCHEW in his individual capacity. At all times material, SILVERMAN was acting under color of law. He is a person under 42 U.S.C. § 1983.

COMPLIANCE WITH PROCEDURAL REQUIREMENTS

8. FARAGHER timely filed a Charge of Discrimination with the Equal Employment Opportunity Commission, which cross-filed it with the relevant deferral agency.

9. The Department of Justice issued FARAGHER a Notice of Right to Sue dated October 7, 1991.

10. FARAGHER and EWANCHEW have both mailed to the CITY OF BOCA RATON written notice of their claims, as prescribed by § 768.28, Florida Statutes.

GENERAL ALLEGATIONS

11. FARAGHER and EWANCHEW, beginning shortly after each was hired and continuing until each resigned, in 1990 and 1989 respectively, was each subjected to an unwelcome, offensive hostile and intimidating work environment that was so pervasive as to affect a term, condition or privilege of her employment e.g.:

a. TERRY subjected FARAGHER and EWANCHEW each to uninvited and offensive touching, including but not limited to squeezing, rubbing and patting their waists, buttocks, shoulders, thighs and calves.

b. TERRY foreclosed any opportunity of advancement for the females on the ocean lifeguard staff, stating on at least one occasion, "It will be a cold day in hell before I make a woman a lieutenant."

c. TERRY and SILVERMAN both, in the presence of female members of the lifeguard staff, referred to women as "cunts," "sluts," "tits," and "bitches."

d. SILVERMAN repeatedly made inappropriate sexual remarks in the presence of each plaintiff, e.g, he:

(1) requested of each FARAGHER and EWANCHEW, as the woman was showering in the lifeguard headquarters, if he could take a shower with her.

(2) commented on the firmness of FARAGHER's breasts.

(3) stated that a rainy day would give him the opportunity "to sit with Nancy [EWANCHEW] and look at her 'tits.'"

(4) forecasted that a bad weather prediction meant "a 40 per cent chance that I'll get a blow job in my truck today."

(5) suggested to FARAGHER that she spend a rainy day in the back of his truck.

(6) discussed in the presence of women lifeguards his sexual conquests of female beach patrons.

12. SILVERMAN further subjected FARAGHER to quid pro quo sexual harassment, telling her, as her supervisor, "Date me or clean the toilets [at the lifeguard headquarters] for a year."

13. Neither FARAGHER nor EWANCHEW welcomed TERRY's and SILVERMAN's advances or was flattered by their comments. To the contrary, each was upset by the conduct and the words.

14. TERRY and SILVERMAN also acted similarly toward other female co-workers of FARAGHER and EWANCHEW, of which conduct FARAGHER and EWANCHEW each was aware, thereby adding to the pervasiveness of the sexually hostile atmosphere.

COUNT I/Faragher's Title VII Claim

15. FARAGHER realleges and adopts, as if fully set forth in Count I, the allegations of ¶¶ 1-9 and 11-14.

16. FARAGHER is among a class of persons protected by Title VII, i.e., she is female.

17. FARAGHER — by being subjected to the sexually hostile atmosphere created by TERRY and SILVERMAN, and to SILVERMAN's quid pro quo threats — was affected in a "term, condition or privilege" of employment as envisioned by 42 U.S.C. § 2000e 2 (a) (1) in that:

a. her physical and/or psychological well-being was affected;

b. the work place became hostile.

18. The sexually hostile environment to which FARAGHER was subjected was based upon her being female: TERRY and SILVERMAN did not act similarly towards male employees.

19. The conduct of BOCA RATON, by and through

the conduct of its agents TERRY and SILVERMAN, deprived FARAGHER of her statutory rights under 42 U.S.C. § 2000e, et seq.

WHEREFORE, plaintiff, BETH ANN FARAGHER, prays that this court will:

A. Award her nominal damages against the CITY OF BOCA RATON for the sexual harassment visited upon her by SILVERMAN and TERRY in violation of her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

B. Grant her costs and a reasonable award of attorney's fees pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e 5(k); and

C. Grant such other and further relief as is just.

COUNT II - Plaintiff, Faragher's § 1983 Damage Claim

20. FARAGHER realleges and adopts the allegations of ¶¶ 1-7 and 11-14 as if they were fully set forth in Count II.

21. The treatment of FARAGHER at the hands of TERRY and SILVERMAN constituted purposeful discrimination based on FARAGHER's gender and violated her rights under the Fourteenth Amendment to the United States Constitution to equal protection and, specifically, her right to be free of discrimination in the work place based on her sex.

22. As a direct, natural, foreseeable and proximate result of the actions and inactions of TERRY and

SILVERMAN, FARAGHER has suffered injuries and losses, all of which injuries and losses are continuing and permanent in nature.

23. The actions of defendants TERRY and SILVERMAN were so malicious and in such reckless indifference to the federally protected rights of FARAGHER as to entitle her to receive an award of punitive damages to punish the defendants, TERRY and SILVERMAN, and to deter them, and others like them, from such conduct in the future.

WHEREFORE, plaintiff BETH ANN FARAGHER prays that this court will enter judgment for her and against defendants TERRY and SILVERMAN, jointly and severally, for compensatory damages and for the costs of this action (including a reasonable attorney's fee); will enter judgment against defendants TERRY and SILVERMAN, in their individual capacities, for exemplary damages; and will grant such other and further relief as is just.

COUNT III - Plaintiff Ewanchew's § 1983 Damage Claim

24. EWANCHEW realleges and adopts the allegations of ¶¶ 1-7 and 11-14 as if they were fully set forth in Count II.

25. The treatment of EWANCHEW at the hands of TERRY and SILVERMAN constituted purposeful discrimination based on EWANCHEW's gender and violated her rights under the Fourteenth Amendment to the United States Constitution to equal protection and, specifically, her right to be free of discrimination in the work place based on her sex.

26. The conduct of defendants TERRY and SILVERMAN created conditions under which no reasonable person could continue to work, thereby constructively discharging EWANCHEW.

27. As a direct, natural, foreseeable and proximate result of the actions and inactions of TERRY and SILVERMAN, EWANCHEW has suffered injuries and losses, all of which injuries and losses are continuing and permanent in nature.

28. The actions of defendants TERRY and SILVERMAN were so malicious and in such reckless indifference to the federally protected rights of EWANCHEW as to entitle her to receive an award of punitive damages to punish the defendants, TERRY and SILVERMAN, and to deter them, and others like them, from such conduct in the future.

WHEREFORE, plaintiffs NANCY EWANCHEW prays that this court will enter judgment for each of them and against defendants TERRY and SILVERMAN, jointly and severally, for compensatory damages and for the costs of this action (including a reasonable attorney's fee); will enter judgment against defendants TERRY and SILVERMAN, in their individual capacities, for exemplary damages; and will grant such other and further relief as is just.

COUNT IV - Plaintiff Faragher's Claim for Battery Against Terry

29. FARAGHER realleges and adopts the allegations of ¶¶ 1-7 and 11-14 as if they were fully set forth in Count IV.

30. The incidents described in ¶ 11(a) constituted actual and intentional touching of FARAGHER by TERRY against the will of FARAGHER.

31. As a direct, natural, foreseeable and proximate result of the actions of TERRY, FARAGHER has suffered injuries and losses, all of which injuries and losses are continuing and permanent in nature.

32. The actions of defendant TERRY were so wanton and willful and in such total disregard of the rights of FARAGHER, as to require the imposition of exemplary damages so as to punish TERRY for his actions and to deter him and others from similar such actions in the future.

WHEREFORE, plaintiff, BETH ANN FARAGHER, prays that this court will enter judgment for her and against defendant TERRY for damages, including for exemplary damages, and for the costs of this action, and will grant such other and further relief as is just.

COUNT V - Plaintiff Ewanchew's Claim for Battery Against Terry

33. EWANCHEW realleges and adopts the allegations of ¶¶ 1-7 and 11-14 as if they were fully set forth in Count VIII.

34. The incidents described in ¶ 11(a) constituted an actual and intentional touching of EWANCHEW by TERRY against the will of EWANCHEW.

35. As a direct, natural, foreseeable and proximate result of the actions of TERRY, EWANCHEW has suffered injuries and losses, all of which injuries and

losses are continuing and permanent in nature.

36. The actions of defendant TERRY were so wanton and willful and in such total disregard of the rights of EWANCHEW, as to require the imposition of exemplary damages so as to punish TERRY for his actions and to deter him and others from similar such actions in the future.

WHEREFORE, plaintiff NANCY EWANCHEW prays that this court will enter judgment for her and against defendant TERRY for damages, including for exemplary damages, and for the costs of this action, and will grant such other and further relief as is just.

COUNT VI/Faragher's Negligent Retention and Supervision Claim Against Boca Raton

37. FARAGHER realleges the allegations of ¶¶ 1-7 and 10-14 as if fully set forth in this count.

38. Defendant BOCA RATON negligently retained TERRY and SILVERMAN as supervisory employees of its Marine Safety division in that BOCA RATON knew or should have known that TERRY and SILVERMAN routinely sexually harassed female employees.

39. BOCA RATON negligently supervised TERRY and SILVERMAN in that each was permitted to engage in the behavior of which FARAGHER and EWANCHEW complain.

40. The actions of defendants TERRY and SILVERMAN, and through him of defendant BOCA RATON, involved a physical impact upon both FARAGHER and EWANCHEW, as more particularly

alleged at ¶ 11(a), which physical impact caused emotional distress.

41. As the direct and proximate result of BOCA RATON's negligent retention and/or supervision of TERRY and SILVERMAN, FARAGHER has suffered injuries and losses, all of which injuries and losses are continuing and permanent in nature.

WHEREFORE, plaintiff BETH ANN FARAGHER prays for judgment against defendant BOCA RATON for damages, costs and such other and further relief as may be just.

COUNT VII/Ewanchew's Negligent Retention and Supervision Claim Against Boca Raton

42. FARAGHER realleges the allegations of ¶¶ 1-7, 10-14 and 38-40 as if fully set forth in this count.

43. As the direct and proximate result of BOCA RATON's negligent retention and/or supervision of TERRY and SILVERMAN, EWANCHEW has suffered injuries and losses, all of which injuries and losses are continuing and permanent in nature.

WHEREFORE, plaintiff NANCY EWANCHEW prays for judgment against defendant BOCA RATON for damages, costs and such other and further relief as may be just.

Respectfully submitted,

/s/ William R. Amlong
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Dated: September 3, 1992

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been served by mail this date upon the following counsel of record:

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/s/ William R. Amlong
WILLIAM R. AMLONG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 92-8010-CIV-HIGHSMITH

BETH ANN FARAGHER
and NANCY EWANCHEW,

Plaintiffs,

vs.

CITY OF BOCA RATON, a political subdivision of the State of Florida; BILL TERRY, individually, and DAVID SILVERMAN, individually,

Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND/OR STRIKE

THIS CAUSE comes before the Court upon Defendants' (City of Boca Raton, Bill Terry, and David Silverman) Motions to Dismiss and/or Strike. Beth Ann Faragher ("Faragher") and Nancy Ewanchew ("Ewanchew"), two female lifeguards, brought this sexual harassment action against their formal municipal employer, the City of Boca Raton ("City"), and two City employees, Bill Terry ("Terry") and David Silverman ("Silverman"). Faragher and Ewanchew assert the following twelve (12) causes of action in their Complaint:

(1) Faragher's claim for joint and several compensatory damages, as well as declaratory and equitable relief and an award of attorney's fees against the City, Terry and Silverman (including Faragher's claim for exemplary damages against Terry and Silverman) pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended by the Civil Rights Act of 1991.

(2) Faragher's claim for damages against the City, Terry, and Silverman pursuant to 42 U.S.C. § 1983;

(3) Ewanchew's claim for damages against the City, Terry and Silverman pursuant to 42 U.S.C. § 1983;

(4) Ewanchew's claim for injunctive relief against the City, Terry and Silverman pursuant to 42 U.S.C. § 1983;

(5) Faragher's claim for battery against Terry;

(6) Faragher's claim for invasion of privacy against Terry;

(7) Faragher's claim for intentional infliction of emotional distress against Terry and Silverman;

(8) Ewanchew's claim for battery against Terry;

(9) Ewanchew's claim for invasion of privacy against Terry;

(10) Ewanchew's claim for intentional infliction of emotional distress against Terry and Silverman;

(11) Faragher's claim for negligent retention, supervision, and training against the City;

(12) Ewanchew's claim for negligent retention, supervision, and training against the City.

The City moves to strike Faragher's Title VII claim for compensatory and punitive damages, as well as the request for a jury trial in Count I, or in the alternative, to strike Faragher's claim for declaratory and injunctive relief in Count I. Additionally, the City moves to dismiss Counts II, III, IV, XI, and XII. Terry moves to dismiss Count I, or in the alternative, to strike Faragher's claim for punitive damages in Count I. Additionally, Terry moves to dismiss Counts VI, VII, IX, and X, and to strike Faragher and Ewanchew's claim for punitive damages in Counts II and III. Silverman moves to dismiss Count I, or in the alternative, to strike Faragher's claim for punitive damages in Count I. Additionally, Silverman moves to dismiss Counts VII and X, and to strike Faragher and Ewanchew's claim for punitive damages in Counts II and III. The City, Terry, and Silverman also move to dismiss all the state tort claims (Counts V through XII) for lack of pendant jurisdiction.

STANDARD OF REVIEW FOR MOTION TO DISMISS

To state a claim, Fed.R.Civ.P. 8(a) requires, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief." The law in this Circuit is well-settled that "the 'accepted rule' for appraising the sufficiency of a complaint is 'that a complaint should not be dismissed for failure to state a claim unless the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"

SEC v. ESM Group, Inc., 835 F.2d 270, 272 (11th Cir. 1988) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957), cert. denied, 486 U.S. 1055 (1988)). On a motion to dismiss, "[a]ll well-pleaded facts in plaintiffs' complaint and all reasonable inferences drawn from those facts are taken as true." Oladeinde v. City of Birmingham, No. 91-7518, slip op. at 2873 (11th Cir. June 24, 1992).

I. Count I.

In Count I, Faragher asserts a cause of action against the City, Terry, and Silverman for sexual harassment, pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991.

A. The City's Motion To Strike

The City asserts that this Court should refuse to apply the Civil Rights Act of 1991 retroactively to Faragher's Title VII claim and, accordingly, Faragher's claim for compensatory damages, as well as the request for a jury trial, should be stricken from Count I.

This Court, as well as a number of federal circuit courts that have addressed the issue, have determined that the 1991 Civil Rights Act is not to be applied retroactively to conduct that occurred prior to the date of its enactment. Doe v. Board of County Comm'rs, 783 F. Supp. 1379 (S.D. Fla. 1992).[1] This Court, therefore, will

[1] Johnson v. Uncle Ben's, Inc., No. 91-2590, — F.2d — (5th Cir. July 1, 1992) (held that § 101 of the Civil Rights Act of 1991 does not apply retroactively to pending cases); Luddington v. Indiana Bell Telephone Co., No. 91-2320, — F.2d — (7th Cir. June 15, 1992) (held that Civil Rights Act of 1991 is applicable only to conduct engaged in after the effective dates in the act); Fray v. Omaha World (continued...)

apply the law that was in effect prior to enactment of the 1991 Act. Thus, the City's motion to strike Faragher's claim for compensatory damages, as well as the request for a jury trial in Count I is GRANTED.

The City also seeks to strike Faragher's claim for declaratory and injunctive relief. To obtain declaratory or injunctive relief, a plaintiff must demonstrate: the likelihood of future injury; that such injury will occur at the hands of the defendant; and that the relief plaintiff seeks is likely to prevent such injury from occurring Cone Corp. v. Florida Dept. of Transp., 921 F.2d 1190, 1203 (11th Cir. 1991), cert. denied, 111 S. Ct. 2238 (1991).

Faragher is no longer employed by the City and does not seek reinstatement to her position. She, therefore, cannot show any likelihood of future injury. Faragher may not obtain an injunction to restrain practices which allegedly injured her in the past, but which no longer affect her. Henson v. City of Dundee, 682 F. 2d 897, 905 (11th Cir. 1982). Furthermore, because Faragher cannot show any likelihood of future injury, a declaration that the City's actions violated her statutory rights "would [be] nothing more than a gratuitous comment without any force or effect." Emory v. Peeler, 756 F.2d 1547, 1552 (11th Cir. 1985). Thus, the City's motion to strike Faragher's claim for declaratory and injunctive relief in Count I is GRANTED.

[1](...continued)
Herald Co., 960 F.2d 1370, 1378 (8th Cir. 1992) (held that § 101 of the Civil Rights Act of 1991 does not apply retroactively to pending cases or other pre-enactment conduct); Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir. 1992) (held that Civil Rights Act of 1991 does not apply retroactively to Plaintiff's claim for damages).

B. Terry and Silverman's Motion To Dismiss

Terry and Silverman assert that Faragher has failed to allege sufficient facts to state a claim for relief under Title VII for the reason that government supervisors sued in their individual capacities are not proper party defendants in a Title VII action. This Court finds that individual capacity suits against an individual employee under Title VII are inappropriate. Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991). "The relief granted under Title VII is against the *employer*, not individual employees whose actions would constitute a violation of the Act." Id. at 772. Neither Terry nor Silverman, as employees, may be sued under Title VII in their individual capacities. Thus, both Terry's and Silverman's motions to dismiss Count I are GRANTED. Count I, as it attempts to assert a cause of action against Terry and Silverman in their individual capacities is DISMISSED with prejudice.

C. Punitive Damages

In Count I, Faragher seeks punitive damages against Terry and Silverman. As this Court has dismissed Count I with prejudice as against Terry and Silverman, their motions to strike Faragher's claim for punitive damages in Count I are, therefore, DENIED as moot.

II. Counts II, III, and IV.

In Count II, Faragher asserts a cause of action against the City, Terry, and Silverman for civil rights violations, pursuant to 42 U.S.C. § 1983. In Count III, Ewanchew asserts a cause of action against the City, Terry, and Silverman for civil rights violations, pursuant to 42 U.S.C. § 1983. In Count IV, Ewanchew seeks injunctive relief against the City, Terry, and Silverman for civil rights

violations, pursuant to 42 U.S.C. § 1983. The standard for assessing the sufficiency of a § 1983 claim is similar to the standard enunciated above. However, courts have tightened the application of Rule 8(a) to § 1983 cases in an "effort to eliminate nonmeritorious claims on the pleadings and to protect public officials from protracted litigation." Arnold v. Board of Educ., 880 F.2d 305, 309 (11th Cir. 1989). "In pleading a section 1983, some factual detail is necessary. . ." Oladeinde v. City of Birmingham, No. 91-7518, slip op. at 2872 (11th Cir. June 24, 1992).

The City moves to dismiss Counts II, III, and IV on the basis that Faragher and Ewanchew have failed to sufficiently allege a cause of action under 42 U.S.C. § 1983. For the following reasons, this Court agrees with the City.

A. Municipal Liability

In Monell v. New York City Dep't of Soc. Serv., 436 U.S. 658, 694 (1978), the United States Supreme Court created a right of action against local government units for deprivation of federal rights in violation of 42 U.S.C. § 1983. The Supreme Court stated that municipal liability under § 1983 attached only when a constitutional deprivation occurs pursuant to a municipality's "official policy."[2] Id. at 694. Thus, under Monell, "recovery from a municipality is limited to acts that are, properly

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[2] The term "official policy" is not limited to written laws. It may also include a custom or usage, even though such a custom or usage has not received formal approval through the municipal body's official decision making channels." Monell, 436 U.S. at 691. According to the Supreme Court, Congress included customs and usages in § 1983 because customs and usages may be so widespread and accepted that they have the force of law. Id. (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970)).

speaking, acts 'of the municipality' that is, acts which the municipality has officially sanctioned or ordered." Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986).

Subsequent to the Monell decision, the United States Supreme Court elaborated the doctrine of municipal liability into several separate theories.[3] Faragher and Ewanchew attempt to state a cause of action under one of the following two theories: (1) that notwithstanding written rules and policies to the contrary, the City effectively delegated final decision making authority to Terry and Silverman on the issue of sexual harassment of female lifeguards (Complaint, at ¶ 5a, D.E. # 1.); and (2) that the actions of Terry and Silverman were so widespread that the City knew or should have known of the alleged sexual harassment (Complaint, at ¶ 5b, D.E. # 1.).

B. Sufficiency of the Complaint
Final Policymaker

Under this theory, liability attaches "where the decision maker possesses final authority to establish municipal policy with respect to the action ordered." Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) (emphasis added). State law determines whether an official is a "final" policymaking authority with respect to the specific subject matter. Id. at 483. "[T]he mere delegation of authority to a subordinate to exercise discretion is not sufficient to give the subordinate policymaking authority. Rather, the delegation must be such that the subordinate's discretionary decisions are not constrained by official policies and are not subject to

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[3] This Court will only address two of those theories because only two are alleged by Faragher and Ewanchew.

review." Wright v. Sheppard, 919 F.2d 665, 674 (11th Cir. 1990) (quoting Mandel v. Doe, 888 F.2d 783, 792 (11th Cir. 1989)).

Upon a careful reading of Faragher and Ewanchew's Complaint, this Court can find no allegation that Terry or Silverman were the officials responsible for establishing final governmental policy with respect to proscriptions on sexual harassment. To the contrary, by alleging that Terry and Silverman were delegated this authority contrary to written rules and policies, Faragher and Ewanchew are alleging that somebody else had the final authority to make rules and regulations concerning sexual harassment. Therefore, taken as true for purposes of this motion to dismiss, Faragher and Ewanchew's allegation that Terry and Silverman were "effectively delegated . . . final decision-making authority" is insufficient to state a cause of action under § 1983.

Municipal Custom

Under this theory, a plaintiff must establish a widespread practice that, "although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law,'" City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1986) (quoting Adickes, 398 U.S. at 167-68). "In other words, a longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it." Brown v. City of Fort Lauderdale, 923 F.2d 1474, 1481 (11th Cir. 1991).

Faragher and Ewanchew do not sufficiently allege a widespread custom. This case is unlike Brown, where plaintiff repeatedly alleged that his experiences were the

result of discriminatory practices accepted by the police department. Brown, 923 F.2d at 1481.[4] Faragher and Ewanchew do not allege any facts that indicate that the City had a widespread practice of either allowing sexual harassment or failing to stop it. Instead, Faragher and Ewanchew allege, in conclusory fashion, that the City knew of Terry and Silverman's alleged harassment because their alleged harassment was constant and done in front of other employees. (Complaint, at ¶ 5b, D.E. # 1.) In light of the heightened pleading requirements for § 1983 causes of action,[5] merely alleging that the City knew or should have known of the alleged sexually harassing conduct of Terry and Silverman, without supporting facts, is insufficient to state a cause of action under § 1983.

Thus, the City's motion to dismiss Counts II, III, and IV is GRANTED. Counts II, III, and IV are DISMISSED without prejudice.

C. Punitive Damages

In Counts II and III, Faragher and Ewanchew seek punitive damages against Terry and Silverman. Terry and Silverman move to strike Faragher and Ewanchew's claim for punitive damages in Counts II and III. Because Counts II and III do not state causes of action upon which relief may be granted, Faragher and Ewanchew may not seek punitive damages in Counts II and III. Terry's and Silverman's motions to strike punitive damages in Counts

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[4] The plaintiff in Brown alleged a **series** of discriminatory practices and that the police chief had knowledge of and acquiesced in those practices. Brown, 923 F.2d at 1481 (emphasis added).

[5] See, supra, Arnold, 880 F.2d at 309; Oladeinde, No. 91-7518, slip op. at 2872.

II and III are, therefore, DENIED without prejudice as moot.

III. Counts V through XII.

A. Pendant Jurisdiction

In Counts V through XII, Faragher and Ewanchew assert various state tort claims. The City, Terry, and Silverman move to dismiss the state claims on the basis of potential jury confusion.

The United States Supreme Court, in United Mine Workers v. Gibbs, 383 U.S. 715 (1966) articulated the doctrine of pendant jurisdiction, and permitted federal courts to exercise jurisdiction over causes of action that contained both federal claims and state claims, based upon a two-step analysis. First, a federal court has power to hear the state claims when the federal and state claims "derive from a common nucleus of operative fact" and are "such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding." Gibbs, 383 U.S. at 725. Secondly, the justification for a federal court's discretion to exercise pendant jurisdiction "lies in considerations of judicial economy, convenience and fairness to the litigants." Gibbs, 383 U.S. at 726.

Recently, Congress codified the doctrine of pendant jurisdiction articulated in Gibbs under the heading of supplemental jurisdiction. 28 U.S.C.A. § 1367 (West Supp. 1991).[6] The statute allows a district court to decline

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[6] 28 U.S.C.A. § 1367(a) (West Supp. 1991) provides:

"... the district courts shall have supplemental jurisdiction over

(continued...)

to exercise supplemental jurisdiction if:

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C.A. § 1367 (c) (West Supp. 1991).

This Court finds that none of the above statutory factors are met in this case. Refusal to exercise pendant jurisdiction in this case would require substantially duplicative proceedings in federal and state courts. See Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983) (applying Gibbs, the Eleventh Circuit held that the district court did not abuse its discretion in exercising jurisdiction where plaintiff alleged a Title VII violation along with the pendant state claims of battery and invasion of privacy). Witnesses in this case, like the witnesses in Phillips, would be forced to testify to the same facts twice if the court refused to exercise its pendant jurisdiction. Phillips, 711 F.2d at 1531.

Based on the above considerations, this Court

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[6](...continued)
all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United State Constitution."

concludes that judicial economy, convenience, and fairness to all litigants is best served by maintaining one action. Thus, the City's, Terry's, and Silverman's motions to dismiss the pendant state claims (Counts V through XII) on the basis of lack of pendant jurisdiction are DENIED.

B. Counts VI and IX (Invasion of Privacy)

In Count VI, Faragher asserts a claim for invasion of privacy against Terry. In Count IX, Ewanchew asserts a claim for invasion of privacy against Terry. Both counts are based on the alleged uninvited and offensive touchings by Terry, which Faragher and Ewanchew claim constituted an unwelcome intrusion into their physical solitude. (Complaint, at ¶ 11a, D.E. # 1.) Terry moves to dismiss Counts VI and IX on the basis that Faragher and Ewanchew have not sufficiently alleged a cause of action for invasion of privacy.

This Court finds that Faragher and Ewanchew have not sufficiently alleged a cause of action for invasion of privacy by Terry. The Eleventh Circuit, in Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524 (11th Cir. 1983), examined Alabama law and determined that the language "wrongful intrusion into one's private activities" was equivalent to the language in § 652B, Restatement (Second) of Torts (1977). Phillips, 711 F.2d at 1534.[7] Therefore, the Eleventh Circuit held that

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[7] § 652B, Restatement (Second) of Torts (1977) states:

"One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a

(continued...)

Alabama had recognized the tort of invasion of privacy in the form described in the Restatement. Phillips, 711 F.2d at 1534.

Florida Courts have recognized the tort of invasion of privacy that consists of "intrusion upon the plaintiff's physical solitude or seclusion as by invading his home . . ." Guin v. City of Riviera Beach, 388 So. 2d 604, 606 (Fla. 4th DCA 1980) (citing W. Prosser, Torts § 117, at 807 (4th ed. 1971)). This language is even more equivalent to § 652B than the language examined in Phillips. Therefore, this Court will apply § 652B and is bound by the interpretation given it by the Eleventh Circuit.

In Phillips, the Eleventh Circuit concluded that under § 652B, a female defendant who was subjected to frequent, intrusive, and coercive sexual demands and threats from her employer had stated a cause of action for invasion of privacy because such conduct constituted an "examination into her 'private concerns,' that is, improper inquiries into her personal sexual proclivities and personality." Phillips, 711 F.2d at 1536.[8] Other courts have

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[7](...continued)
reasonable person."

[8] In Phillips, the employer had called Plaintiff into his office, locked the door, and inquired how often Plaintiff had sex with her husband, what positions they used, and if Plaintiff had ever engaged in oral sex. Phillips, 711 F.2d at 1527. This happened two to three times a week. Id. The employer, in later conversations insisted that Plaintiff engage in oral sex with him on penalty of losing her job. Id. This happened on several occasions. Id. On one occasion, the employer began to cover the window in his office with paper to prohibit anyone from seeing inside, and as Plaintiff forced her way out of the office, the employer hit her across the bottom with the back of his hand. Id.

concluded that sexual comments alone,[9] or comments combined with incidents of touching do not constitute an invasion of privacy.[10] Faragher and Ewanchew only allege that Terry subjected them to "squeezing, rubbing and patting (of plaintiffs') waists, buttocks, shoulders, thighs, and calves" (Complaint, at ¶ 11a, D.E. #1.); and that Terry referred to women as "cunts," "sluts," "tits," and "bitches." This Court finds that both this alleged conduct and this alleged language are offensive and rude. However, this alleged conduct and language does not rise to the level of intrusiveness found in Phillips to constitute an invasion of privacy under § 652B. Thus, Terry's motion to dismiss counts VI and IX is GRANTED. Counts VI and IX are DISMISSED without prejudice.

C. Counts VII and X (Intentional Infliction of Emotional Distress)

In Count VII, Faragher asserts a cause of action against Terry and Silverman for intentional infliction of emotional distress. In Count X, Ewanchew asserts a cause of action against Terry and Silverman for intentional infliction of emotional distress. Terry and Silverman move to dismiss Counts VII and X on the basis that Faragher and Ewanchew have failed to sufficiently allege a cause of action for intentional infliction of emotional distress.

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[9] Ponton v. Scarfone, 468 So. 2d 1009 (Fla. 2nd DCA 1985) (utterances intended to induce plaintiff to join defendant in a sexual liaison did not constitute an invasion of privacy).

[10] Haehn v. City of Hoisington, 702 F. Supp. 1526 (D. Kan. 1988) (under Kansas law interpretation of § 652B, defendant's sexual comments and brief touchings did not rise to the level of intrusion found in Phillips and, therefore, did not constitute invasion of privacy).

Florida has adopted the Restatement (Second) of Torts (1965)'s standard for the tort of intentional infliction of emotional distress. Eastern Airlines, Inc. v. King, 557 So. 2d 574, 575 (Fla. 1990). The Restatement defines intentional infliction of emotional distress as follows:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Restatement (Second) of Torts § 46 (1965). Outrageous conduct is conduct which "is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Metropolitan Life Ins. Co. v. McCarson, 467 So.2d 277, 278-79 (Fla. 1985) (quoting Restatement (Second) of Torts, § 46, cmt. D (1965)).

Florida courts, as well as federal courts in this circuit, have been unwilling to find a cause of action for intentional infliction of emotional distress in the employment context. This Court is not aware, and Faragher and Ewanchew have not cited a single case arising under Florida law where a court has recognized a cause of action for intentional infliction of emotional distress based on sexual harassment. On the contrary, Florida courts and federal courts in this circuit have continually not found a cause of action for intentional infliction of emotional distress based on sexual harassment. See Studstill v. Borg Warner Leasing, 806 F.2d 1005, 1007-08 (11th Cir. 1986) (the court held that

plaintiff's allegations of sexual harassment, including dirty jokes, off-color comments, and profane suggestions did not constitute conduct sufficiently heinous to support a claim for intentional infliction of emotional distress); Forde v. Royal's Inc., 537 F. Supp. 1173, 1174-76 (S.D. Fla. 1982) (court rejected an intentional infliction of emotional distress claim where plaintiff alleged she had been subjected to unsolicited sexual invitations from her supervisor); Ponton v. Scarfone, 468 So. 2d 1009, 1011 (Fla. 2d DCA 1985) (employer's conduct in attempting to induce an employee to join with him in a sexual liaison did not rise to the level of outrageousness necessary to state a cause of action for intentional infliction of emotional distress).

This Court takes note that the Florida Supreme Court has recognized that "public policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist." Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099, 1104 (Fla. 1989) (citations omitted). The Court deplores the offensive behavior of both Terry[11] and Silverman,[12] and hopes that such behavior becomes

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[11] Faragher and Ewanchew allege that Terry squeezed, rubbed, and patted their waists, buttocks, shoulders, thighs and calves; and referred to women as "cunts," "sluts," "tits," and "bitches." (Complaint, at ¶ 11a, 11c, D.E. #1.)

[12] Faragher and Ewanchew allege that Silverman referred to women as "cunts," "sluts," "tits," and "bitches;" and that Silverman made inappropriate sexual remarks in the presence of each Plaintiff. (Complaint, at ¶ 11c, 11d, D.E. #1.) Silverman's remarks include:

> (1) requesting to shower with Faragher and Ewanchew, while Faragher and Ewanchew were showering in the lifeguard headquarters;

(continued...)

extinct in the workplace. However, neither the allegations of Terry's uninvited touchings and foul language, nor the allegations of Silverman's foul language and unsolicited sexual invitations, taken separately, rise to the level of outrageousness necessary to state a claim for intentional infliction of emotional distress. Therefore, Terry's and Silverman's motions to dismiss Counts VII and X are GRANTED. Counts VII and X are DISMISSED without prejudice.

D. Counts XI and XII (Negligent Retention, Supervision and Training

In Count XI, Faragher asserts a cause of action against the City for negligent retention, supervision, and training. In Count XII, Ewanchew asserts a cause of action against the City for negligent retention, supervision, and training. The City moves to dismiss Counts XI and XII on the basis that the City is sovereignly immune or, in the alternative, that the Workers' Compensation Act provides the exclusive remedy for injuries caused by the negligence of the employer.

Fla. Stat. § 768.28 (1989) waived sovereign immunity and made political subdivisions liable for torts in the same

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[12](...continued)

(2) commenting on the firmness of Faragher's breasts;
(3) stating that a rainy day would give him an opportunity to sit with Ewanchew and look at her "tits;"
(4) forecasted that a bad weather prediction meant a 40 per cent chance that he'll get a blow job in his truck;
(5) suggested to Faragher that she spend a rainy day in the back of his truck; and
(6) discussed his sexual conquests of female beach patrons in the presence of women lifeguards.

manner as private individuals. The broad purpose of this statute is to waive sovereign immunity. Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979). In interpreting this statute, the Florida Supreme Court has determined that certain "discretionary" planning level functions are immune from liability, while certain "operational" decisions are not. Id. at 1021 (emphasis added). In order to determine whether the challenged act is discretionary or operational, the Florida courts have adopted a case by case method of identifying these functions based on Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965), and Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

The courts of Florida also developed a definition for discretionary and operational functions. A discretionary act is an exercise of executive or legislative power such that, for the courts to intervene by way of tort law, they would inappropriately entangle themselves in fundamental questions of policy and planning; while an operational function is one not necessarily inherent in policy or planning, but merely reflects a secondary decision as to how those policies or plans are implemented. Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989).

Before turning to the tests which help determine whether an act or decision is discretionary or operational, this Court must first consider whether there is a common law or statutory duty. There can be no governmental liability "if *either* (a) no duty of care existed, *or* (b) the doctrine of governmental immunity bars the claim." Kaisner, 543 So. 2d at 734.

The City, by instituting a policy against sexual harassment in the workplace, has a duty to keep the

workplace free from sexual harassment. Once the City has initiated a policy against sexual harassment, it assumes a duty to operate this policy effectively.[13] In operating this policy effectively, certain decisions must be made regarding supervision and retention of employees accused of sexual harassment. Such decisions regarding supervision and retention of employees, are part of, and not separate from, a decision to institute a policy against sexual harassment in the workplace.

The decision whether or not to train employees with respect to sexual harassment is a separate decision that may or may not be part of a policy against sexual harassment. This Court is not aware of any duty that exists to train employees with respect to sexual harassment. Therefore, the only way a duty of care could arise with respect to training employees with regard to sexual harassment, is if the City assumed a duty to do so by implementing training procedures. In their Complaint, Faragher and Ewanchew allege that the City "afforded no formal or informal in-service or other training." (Complaint, at ¶53, D.E. # 1.) Thus, this Court finds that Faragher and Ewanchew have failed to allege sufficient facts, whereby this Court could find a duty of care on the part of the City to train its employees with respect to sexual harassment.

Next, the Court must determine whether the City is immune from decisions relating to the supervision and

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[13] See Avallone v. Board of County Comm'rs of Citrus County, 493 So. 2d 1002 (Fla. 1986) (the decision to operate or not operate a swimming pool is discretionary, but once the County decides to operate the swimming facility, it assumes a common law duty to operate the facility safely and is no longer immune from suit on that decision).

retention of employees.[14] Applying the tests and definitions that determine whether a decision or act is discretionary or operational, this Court finds that decisions relating to the supervision and retention of Terry and Silverman are operational, and not immune from suit.

The test in Johnson is whether the act of the County in deciding whether or not to supervise or retain Terry and Silverman involved quasi-legislative policy-making which is sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision. Johnson, 69 Cal. 2d at 794, 447 P.2d at 360-61, 73 Cal. Rptr. at 248-49, *adopted in* Commercial Carrier, 371 So. 2d at 1021-22. The answer is no with respect to decisions regarding the retention and supervision of Terry and Silverman. Decisions regarding the retention and supervision of Terry and Silverman are not legislative, but are merely secondary decisions that are necessary in effectively operating a policy against sexual harassment.

In Evangelical, the Court enunciated a four-part test:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

(2) Is the questioned act, omission, or decision essential to the realization or

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[14] The Court need not address whether the City is immune from suit with respect to the decision of whether or not to train employees because Faragher and Ewanchew have failed to allege the existence of duty to train employees with respect to sexual harassment.

accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?

(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Evangelical, 67 Wash. 2d at 255, 407 P.2d at 445 (adopted in Commercial Carrier, 371 So. 2d at 1019).

First, decisions regarding supervision and retention of employees accused of sexual harassment involves the basic governmental policy of keeping the workplace free from sexual harassment.

Second, decisions regarding the supervision and retention of employees accused of sexual harassment are not essential to the basic policy concerning sexual harassment, but are secondary to that policy, once the decision to implement such a policy has been made.

Third, decisions regarding the supervision and retention of employees accused of sexual harassment do not require basic policy evaluation and expertise on the part of the City, but involve secondary judgments as to how City policies against sexual harassment are implemented.

Fourth, the City has the authority to make decisions regarding the supervision and retention of employees accused of sexual harassment.

Under the analysis in Commercial Carrier, these tests are very persuasive. 371 So. 2d at 1019. If these questions are clearly and unequivocally answered yes, then the challenged act, omission, or decision is probably a policy-making, planning function immune from liability. Commercial Carrier, 371 So. 2d at 1019. If one or more of the questions is answered in the negative, further inquiry is necessary. Commercial Carrier, 371 So. 2d at 1019. We thus turn to definitions of operational and discretionary stated in Kaisner, 543 So. 2d at 737.

While decisions relating to supervision and retention of employees accused of sexual harassment involve a degree of discretion, this Court finds that it is not the type of discretion that needs to be insulated from suit. Intervention of the courts in cases involving the supervision and retention of employees accused of sexual harassment will not entangle them in fundamental questions of public policy and planning. This Court will merely be required to determine if the City should have acted more carefully in protecting Faragher and Ewanchew from sexual harassment in the workplace. This Court will not be required to examine if the City should or should not institute a policy against sexual harassment and what type of policy that should be. The City has already made that decision. This Court will merely be required to determine if the County was negligent in operating this policy.

Therefore, the City is not entitled to sovereign immunity, pursuant to Fla. Stat. § 768.28, based on its alleged negligent supervision and retention of Terry and

Silverman.

The City also asserts that Faragher and Ewanchew's claim for the negligent retention, supervision, and training of Terry and Silverman is barred by the exclusivity provision of the state's Workers' Compensation Act.

Florida's Workers' Compensation Act, Fla. Stat. § 440.11 (West 1991), states that an employer's liability to its employees "shall be exclusive and in place of all other liability." The Florida Supreme Court has stated that it is "now well established in our law, that workers' compensation generally is the sole tort remedy available to a worker injured in a manner that falls within the broad scope and policies of the workers' compensation statute." Byrd v. Richardson-Greenshields Securities, 552 So. 2d 1099, 1100 (Fla. 1989). However, in Byrd, the Florida Supreme Court created an exception to the exclusivity rule for sexual harassment claims. In Byrd, female employees brought claims for assault and battery, intentional infliction of emotional distress, and negligent hiring and retention of employees based upon male employees repeatedly touching and making verbal sexual advances to them in the work place. The Florida Supreme Court stated:

> "In light of this overwhelming public policy, we cannot say that the exclusivity rule of the workers' compensation statute should exist to shield an employer from all tort liability based on incidents of sexual harassment. The clear public policy emanating from federal and Florida law holds that an employer is charged with maintaining a workplace free from sexual harassment. Applying the exclusivity rule of

> workers' compensation to preclude any and all tort liability effectively would abrogate this policy, undermine the Florida Human Rights Act, and flout Title VII of the Civil Rights Act of 1964.
>
> This, we cannot condone. Public policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist, whether the tort claim is premised on a remedial statute or on the common law. . . .
>
> Similarly, to the extent that the claim alleges assault, intentional infliction of emotional distress arising from sexual harassment of the specific type of battery involved in this case, the exclusivity rule also will not bar them. This is so because these causes of action address the very essence of the policies against sexual harassment-an injury to intangible personal rights."

Byrd, 552 So. 2d at 1103-4 (footnotes omitted).

Therefore, in light of the strong public policy against sexual harassment in the workplace, this Court interprets Byrd as holding that the exclusivity rule of the workers' compensation statute does not bar Faragher's and Ewanchew's claim of negligent retention, supervision, and training.

Taken as true for purposes of this motion to dismiss, the allegations of Faragher and Ewanchew are sufficient to state a claim for the negligent retention and supervision of Terry and Silverman. Taken as true for purposes of this motion to dismiss, the allegations of Faragher and

Ewanchew are not sufficient to state a claim for the negligent training of Terry and Silverman. Thus, the County's motion to dismiss Counts XI and XII are GRANTED with respect to the negligent training claim and DENIED with respect to the negligent retention and supervision claim. Counts XI and XII as they pertain to Faragher's and Ewanchew's claim for negligent training are DISMISSED without prejudice.

IV. Conclusion

Based on the foregoing considerations, it is hereby

ORDERED AND ADJUDGED that:

(1) The City's motion to strike Faragher's claim for compensatory damages, as well as the request for a jury trial in Count I is GRANTED. The City's motion to strike Faragher's claim for declaratory and injunctive relief in Count I is GRANTED.

(2) Terry's and Silverman's motion to dismiss Count I is GRANTED and Count I, as it attempts to assert a cause of action against Terry and Silverman in their individual capacities, is DISMISSED with prejudice. Furthermore, Terry's and Silverman's motions to strike Faragher's claim for punitive damages in Count I are DENIED as moot.

(3) The City's motion to dismiss Counts II, III, and IV is GRANTED and Counts II, III, and IV are DISMISSED without prejudice. Therefore, Terry's and Silverman's motions to strike punitive damages in Counts II and III are DENIED without prejudice as moot.

(4) The City's, Terry's, and Silverman's motions to

dismiss the state tort claims (Counts V through XII) for lack of pendant jurisdiction are DENIED.

(5) Terry's motion to dismiss Counts VI and IX is GRANTED and Counts VI and IX are DISMISSED without prejudice.

(6) Terry's and Silverman's motions to dismiss Counts VII and X are GRANTED and Counts VII and X are DISMISSED without prejudice.

(7) The City's motion to dismiss Counts XI and XII is GRANTED with respect to Faragher's and Ewanchew's claim for negligent training, and DENIED with respect to Faragher's and Ewanchew's claim for negligent retention and supervision. Counts XI and XII are DISMISSED without prejudice as they pertain to Faragher's and Ewanchew's claim for negligent training.

Faragher and Ewanchew have fifteen (15) days from the date of this order in which to file an Amended Complaint.

DONE AND ORDERED in Chambers at Miami, Florida, this 13th day of August, 1992.

/s/_____
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

BETH ANN FARAGHER and NANCY EWANCHEW,

Plaintiffs,

vs.

CITY OF BOCA RATON, a political subdivision of the State of Florida; BILL TERRY, individually and DAVID SILVERMAN, individually,

Defendants.
_____/

CASE NO. 92 8010 CIV-HIGHSMITH

ANSWER OF CITY OF BOCA RATON TO FIRST AMENDED COMPLAINT

The City of Boca Raton ("Defendant"), by and through its undersigned counsel, hereby respond to the numbered paragraphs of plaintiffs' complaint as follows:

Introduction

1. Defendant **admits** the nature of the suit, but **denies** that plaintiffs are entitled to any relief.

Jurisdiction

2. **Admit.**

3. **Admit.**

Parties

4. Defendant **admits** that plaintiffs were employed as alleged, but **denies** that such employment was during all times material.

5. Defendant **admits** that it is a political subdivision of the State of Florida; that it is a municipal corporation; that it is an employer under 42 U.S.C. § 2000e (b); and that it employs more than 15 persons, but the remaining allegations in paragraph 5 are **denied**.

6. Defendant **admits** that defendant Bill Terry was an employee of the City of Boca Raton; that he was the Marine Safety Chief; that he had supervisory responsibilities over plaintiffs Faragher and Ewanchew, as well as defendant David Silverman; that he is being sued by plaintiffs in his individual capacity with regard to the § 1983 and battery counts; that he acted under color of state law; and that he is a person under 42 U.S.C. § 1983, but the remaining allegations in paragraph 6 are **denied.**

7. Defendant **admits** that defendant David Silverman was an employee of the City as a Marine Safety Captain or Marine Safety Lieutenant; that he had some supervisory responsibilities over plaintiffs Faragher and Ewanchew; that he is being sued by plaintiffs in his individual capacity; and that he is a person under 42 U.S.C. § 1983, but the remaining allegations in paragraph 7 are **denied**.

Compliance with Procedural Requirements

8. Defendant **admits** that Faragher filed a charge of discrimination with the Equal Employment Opportunity Commission which cross-filed it with the

relevant deferral agency; however, defendant is without knowledge as to the timeliness of Faragher's charge and therefore **denies** that it was timely filed.

9. **Admit.**

10. **Admit.**

General Allegations

11. Although based on its investigation defendant City of Boca Raton believed that defendants Terry and Silverman engaged in some offensive work place conduct, defendant **denies** that plaintiffs were "subjected to an unwelcome, offensive, hostile and intimidating work environment that was so pervasive as to effect a term, condition or privilege of Faragher's employment." Defendant further **denies** the allegations as stated in sub-paragraphs 11(a)-(d).

12. **Deny.**

13. Without knowledge and therefore **denied.**

14. **Deny.**

Count I - Faragher's Title VII Claim Against the City of Boca Raton

15. Defendant answers as in the numbered paragraphs above.

16. **Admit.**

17. **Deny.**

18. **Deny.**

19. **Deny.**

Count VI - Faragher's Negligent Retention and Supervision Claim Against the City of Boca Raton

37. Defendant City of Boca Raton answers as in the numbered paragraphs above.

38. **Deny.**

39. **Deny.**

40. **Deny.**

41. **Deny.**

Count VII - Ewanchew's Negligent Retention and Supervision Claim Against the City of Boca Raton

42. Defendant City of Boca Raton answers as in the numbered paragraphs above.

43. **Deny.**

Additional Defenses

1. The complaint fails to state a claim upon which relief may be granted.

2. Plaintiffs have failed to mitigate their damages.

3. Plaintiff's Title VII claim was not timely filed

and is thus barred.

4. Plaintiff is not entitled to attorney's fees based on an award of nominal damages under Title VII.

5. Plaintiffs participated in and consented to the complained of workplace environment.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS
Counsel for Defendants

/s/ Peter J. Hurtgen
PETER J. HURTGEN
Florida Bar No. 229921
CATHY M. STUTIN
Florida Bar No. 865011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to William R. Amlong, Esq., Amlong & Amlong, P.A., 101 N.E. 3rd Avenue, Suite 203, Fort Lauderdale, Florida 33301 and Stuart A. Goldstein, Esq., 444 Brickell Avenue, Suite 300, Miami, Florida, 33131 on this 21st day of September, 1992.

/s/_____
Peter J. Hurtgen

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

BETH ANN FARAGHER
and NANCY EWANCHEW, Case No. 92-8010-Civ-Highsmith

Plaintiffs,

vs.

CITY OF BOCA RATON, a political subdivision of the State of Florida; BILL TERRY, individually, and DAVID SILVERMAN, individually,

Defendants.
_____/

NOTICE OF SERVICE OF ANSWERS TO INTERROGATORIES

Plaintiff BETH ANN FARAGHER hereby gives notice of service of answers to Defendant's First Interrogatories to Plaintiff filed over certificate of service dated April 20, 1992.

Respectfully submitted,

/s/ William R. Amlong
WILLIAM R. AMLONG
Fla. Bar No. 470228
AMLONG & AMLONG, P.A.
Attorneys for Plaintiffs
101 N.E. Third Avenue, #203
Fort Lauderdale, Florida 33301
(305) 462-1983

Dated: June 8, 1992

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been served by mail this date upon the following counsel of record:

Stuart A. Goldstein
Attorney for Defendant Silverman
444 Brickell Avenue
Suite 300
Miami, Florida 33131

Peter Hurtgen, Esq.
Morgan, Lewis & Bockius
Attorneys for Defendants City of Boca Raton and Terry
5300 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131

/s/ William R. Amlong
WILLIAM R. AMLONG

4. If you have any physical complaints or emotional injuries which you attribute to these incidents, please state the nature of all such complaints.

4. Because of the situation involved in working with SILVERMAN and TERRY, I have suffered diminished self-esteem and self-respect; humiliation, embarrassment.

5. Please state the name and addresses of any and all psychologists, physicians, psychiatrists, therapists and/or hospitals where you received any treatment whatsoever following these incidents or complaints and the dates of all visits and confinements and the nature of any such treatment.

5. None.

6. If you have ever had any other injuries complaints or symptoms before these incidents or complaints which were in any way similar to those you sustained in these incidents or complaints, list your injuries and complaints, giving the dates such similar conditions occurred.

6. None.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 92-8010-CIV-HIGHSMITH

BETH ANN FARAGHER and
NANCY EWANCHEW,

Plaintiffs,

vs.

CITY OF BOCA RATON, a
political subdivision of the
State of Florida; BILL TERRY,
individually, and DAVID
SILVERMAN, individually,

Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS CAUSE came before the Court upon Defendant City of Boca Raton's ("City") motion for partial summary judgment, pursuant to Fed.R.Civ.P. 56(d). Plaintiffs Beth Ann Faragher and Nancy Ewanchew, two females formerly employed as lifeguards by the City bring this action against the City, and two City employees, Bill Terry and David Silverman, alleging that Terry and Silverman subjected them to sexual harassment.

In their amended complaint, Faragher and Ewanchew assert equal protection claims against Terry and

Silverman, individually, pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment. They also assert claims for common law battery against Terry. As to the City, the amended complaint includes the following causes of action: Faragher's sexual harassment claim, pursuant to Title VII of the Civil Rights Act of 1964 (Count I); and Faragher's and Ewanchew's claims for negligent retention and supervision of Terry and Silverman (Counts VI and VII). In its motion, the City seeks partial summary judgment as to all three of these counts.

STANDARD OF REVIEW

In deciding motions for summary judgment, the Court must use as its guide the standard set forth in Fed.R.Civ.P. 56(c), which states in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The United States Supreme Court has addressed the standard for summary judgment, as set forth in Rule 56(c), as follows:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of

a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

After the moving party has met this initial burden, "[tlhe evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Fed.R.Civ.P. 56(e), however, does not permit the nonmoving party to avoid summary judgment by resting on the pleadings, but "requires the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. Moreover, the mere existence of a scintilla of evidence in support of the non-movant's position is insufficient; there must be evidence on which the jury could reasonably find for the non-movant. Anderson, 477 U.S. at 251-52.

UNDISPUTED MATERIAL FACTS

1. Plaintiffs Faragher and Ewanchew worked as lifeguards in the City's Marine Safety Division, which is part of the City's Parks and Recreation Department.

2. The City employed Faragher from September 1985 through June 1990, and Ewanchew from April 1987 through April 1989.

3. Defendant Terry was the Chief of the Marine Safety Division throughout the plaintiffs' tenure in that division.

4. Defendant Silverman was hired by the City as a lifeguard in January 1980, was promoted to lieutenant

in July 1985, and to captain in June 1989.

5. In April, 1989, Ewanchew resigned her position with the City.

6. Faragher resigned her position in June, 1990, to attend law school. Her decision to leave the City was unrelated to the alleged sexual harassment.

7. On April 23, 1990, Ewanchew wrote a letter to Richard Bender, Director of Personnel for the City, complaining that, during the time she was employed by the City, she and other female lifeguards had been sexually harassed by Terry and Silverman.

8. Prior to Ewanchew's letter, neither Ewanchew nor Faragher had complained to the Parks and Recreation Department management about their allegations of sexual harassment.

9. The same union bargaining unit has represented the lifeguards and lieutenants working for the Marine Safety Division since sometime before 1985. The unit has a collective bargaining agreement with the City, which includes an employee grievance and arbitration procedure. Faragher and Ewanchew did not initiate grievance proceedings.

10. Based on its investigation of Ewanchew's complaint, the City determined that there had been some inappropriate conduct on the part of Terry and Silverman. The City reprimanded both Terry and Silverman for that conduct on June 26, 1990, imposing a choice of disciplinary action in the form of suspension without pay or forfeiture of annual leave. Terry and Silverman forfeited 160 and 40 hours of annual leave, respectively.

DISCUSSION

Faragher's Title VII Claim (Count I)

Courts recognize two theories under which plaintiffs may pursue Title VII claims for sexual harassment: (1) quid pro quo; and (2) hostile environment. Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1315 (11th Cir. 1989). "Quid pro quo harassment occurs when an employer alters an employee's job conditions as result of the employees refusal to submit to sexual demands." Id. Hostile environment sexual harassment occurs when an employers conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

In her Title VII claim, Faragher does not appear to be alleging a quid pro quo cause of action. Faragher alleges only one incident related to her job conditions; namely, a statement by Terry that she would be cleaning toilets for a longer period of time than was normal for new lifeguards. In support of its motion for partial summary judgment, the City has presented an exhaustive analysis concerning the legal sufficiency of a quid pro quo claim predicated on this sole allegation. Faragher has not challenged the City's arguments. Therefore, the Court addresses Faragher's Title VII claim only in terms of the hostile environment theory.

The elements of a prima facie case for hostile environment sexual harassment are: (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the

harassment complained of affected a "term, condition, or privilege" of employment; and (5) respondeat superior; i.e., the employer knew or should have known of the harassment in question but failed to take prompt remedial action. Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982). The City seeks a judgment as a matter of law on the grounds that, given the undisputed facts, Faragher cannot establish the respondeat superior element of the prima facie case. There are two methods by which a plaintiff may prove this element of a hostile environment theory. "The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment, or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." Henson, 682 F.2d at 905. See also Sanchez v. City of Miami Beach, 720 F. Supp. 974, 981 (S.D. Fla. 1989). The City argues that Faragher cannot prove either actual or constructive knowledge on the part of the City.

It is undisputed that Faragher did not complain to higher management in the City's Parks and Recreation Department regarding Terry and Silverman's alleged conduct. Indeed, the first such complaint was made by Ewanchew in her April, 1990 letter to the City's personnel director. Two months after Ewanchew's letter, the City imposed disciplinary action on Terry and Silverman. Faragher argues that the City had earlier actual knowledge of Terry and Silverman's alleged harassment through Ewanchew's complaints during her tenure to lifeguard captain Robert Gordon. Faragher does not claim, however, that Gordon was a member of higher management in the City's Parks and Recreation Department. Therefore, the Court rejects Faragher's attempt to impose earlier actual knowledge on the City

through Gordon.[1]

The Court next examines the constructive knowledge prong of the respondeat superior element. Upon receipt of Ewanchew's letter, Personnel Director Bender initiated an investigation into her allegations. After interviewing various female employees assigned to the Marine Safety Division, including Faragher, Bender concluded that Terry's and Silverman's alleged conduct rose "to the level of hostile environment for female staff." (Exhibit #5 to Deposition of Richard Bender.) In affidavits proffered by the City in support of its motion, two of the employees previously interviewed by Bender, Janice Chisesi and Kathy Buhr, deny any knowledge of sexual harassment on the part of Terry and Silverman. (Exhibits #8 and 9 to City's Notice of Filing Deposition Excerpts and Affidavits.) Rather than establishing the City's lack of constructive knowledge, these affidavits create a genuine issue of material fact regarding the pervasiveness of Terry and Silverman's alleged harassment.[2] Just as Bender concluded through his investigation that Terry and Silverman's conduct created a hostile environment for females, a fact finder could determine that Terry's and Silverman's alleged harassment was sufficiently pervasive to support an inference of constructive knowledge on the part of the City regarding such conduct. Consequently, the Court finds that the City is not entitled to judgment as a matter of law on Faragher's Title VII claim.

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[1] Faragher also argues that, even if the City did not have actual knowledge of Terry's and Silverman's alleged conduct until April, 1990, the City failed to take prompt remedial action or that the action taken was ineffective. The Court need not address these arguments in light of its constructive knowledge analysis, which follows.

[2] At a minimum, the affidavits create an issue of credibility for the fact finder.

Faragher's and Ewanchew's Negligent Retention and Supervision Claims (Counts VI and VII)

"Negligent retention of an employee occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with the employee that indicate his unfitness, but the employer fails to take further action, such as investigation, discharge, or reassignment." Tallahassee Furniture Co., Inc. v. Harrison, 583 So. 2d 744, 753 (Fla. 1st DCA 1991), rev. denied, 595 So. 2d 558 (Fla. 1992) (citing Garcia v. Duffy, 492 So. 2d 435, 438-39 (Fla. 2d DCA 1986)). This actual or constructive notice requirement applies equally to claims for negligent supervision. M.V. v. Gulf Ridge Council Boy Scouts of America, Inc., 529 So. 2d 1248, 1248 (Fla. 2d DCA 1988). In support of its motion for summary judgment on these claims, the City advances the same lack of notice arguments that it raised regarding the Title VII claim. Because the Court has found that genuine issues of material fact exist regarding the City's constructive knowledge for purposes of the Title VII claim, the Court concludes that the City is not entitled to summary judgment on the negligent retention and supervision claims on notice grounds.

The City further argues that Faragher and Ewanchew's negligent retention and supervision claims must fail with regard to Silverman because the plaintiffs have not alleged an underlying tort as to him. See Walsingham v. Browning, 525 So. 2d 996, 998 (Fla. 1st DCA 1988).[3] Faragher and Ewanchew concede that an employer's liability for negligent retention and supervision requires wrongful conduct on the part of the

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[3] As previously noted, both plaintiffs have asserted claims for battery against Terry.

employee. They offer two reasons why the Court should not grant the City's motion on this issue. First, Faragher and Ewanchew claim that they have alleged tortious conduct on the part of Silverman in the form of "violations of Title VII and violations of both plaintiff's [sic] constitutional rights to equal protection." (Plaintiffs' Response to Defendant City of Boca Raton's Motions for Summary Judgment: Counts I, VI and VII, D. E. # 106, at 19.) This alleged tortious conduct, however, derives from federal, rather than state law. Faragher and Ewanchew fail to provide any legal basis for the proposition that the tortious conduct requirement for their state law claims may be satisfied in this novel fashion. The Court, therefore, rejects the first of plaintiffs' arguments.

Alternatively, Faragher and Ewanchew argue that the City's negligence is "negligence per se," arising from the City's violation of the Equal Employment Opportunity Commission's sexual harassment regulations. Again, the plaintiffs offer no legal authority in support for this proposition. Moreover, the plaintiffs' arguments that the City is negligent for its own acts still does not satisfy the requirement of pleading an underlying tort on the part of the employee in order to assert a cause of action for negligent hiring and supervision of that employee. The Court, therefore rejects the plaintiffs' second argument. Because the plaintiffs have not alleged the required wrongful conduct on the part of Silverman, the Court concludes that the City is entitled to judgment as a matter of law on Faragher and Ewanchew's claims for negligent retention and supervision of Silverman.[4]

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[4] In light of this determination, the Court need not reach the City's additional argument regarding Ewanchew's failure to satisfy Florida's "impact rule" with regard to her claim for negligent
(continued...)

CONCLUSION

Based on the foregoing considerations, it is hereby

ORDERED AND ADJUDGED that:

(1) The City's motion for partial summary judgment as to Count I is DENIED.

(2) The City's motion for partial summary judgment as to Counts VI and VII is GRANTED IN PART and DENIED IN PART. The motion is GRANTED as to Faragher and Ewanchew's claims for negligent retention and supervision of Silverman. The motion is DENIED in all other respects.

DONE AND ORDER in Chambers, at Miami, Dade County, Florida this 26th day of April, 1994.

/s/ _____
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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[4](...continued)
retention and supervision of Silverman.

CASE NO.: 92-8010-CIV-HIGHSMITH

BETH ANN FARAGHER and
NANCY EWANCHEW,

Plaintiffs,

vs.

CITY OF BOCA RATON, a
political subdivion of the
State of Florida; BILL TERRY,
individually, and DAVID
SILVERMAN, individually,

Defendants.

_____/

ORDER ON PARTIES' POST-TRIAL MOTION FOR ATTORNEYS' FEES AND COSTS

THIS CAUSE came before the Court upon the following post-trial motion for attorneys' fees and costs:

(1) Defendant City of Boca Raton's motions for attorneys' fees and costs (D.E. #172 and 173), and supplements thereto;

(2) Defendant Bill Terry's motion for attorneys' fees and costs (D.E. #174, Parts 1 and 2);

(3) Plaintiffs Beth Ann Faragher and Nancy Ewanchew's motions for attorneys' fees and costs (D.E. #169 and 175), and supplements thereto.

THESE MATTERS were referred to United States

Magistrate Judge Stephen T. Brown. A Report and Recommendation, dated March 7, 1995, has been filed.

Upon a *de novo* review of these matters, as well as consideration of Defendant City of Boca Raton's objections to the Magistrate Judge's Report and Recommendation it is hereby

ORDERED AND ADJUDGED that United States Magistrate Judge Brown's Report and Recommendation be, and the same is

RATIFIED, AFFIRMED and APPROVED in its entirety.

Accordingly, it is further

ORDERED and ADJUDGED that:

(1) Defendant City of Boca Raton's motion for attorney's fees and costs (D.E. #172 and 173), and supplements thereto, are DENIED;

(2) Defendant Bill Terry's motion for attorneys' fees and costs (D.E. #174, Parts 1 and 2) is DENIED;

(3) Plaintiffs Beth Ann Faragher and Nancy Ewanchew's motions for attorneys' fees and costs (D.E. #169 and 175), and supplements thereto, are GRANTED IN PART as follows.

(4) Plaintiff Beth Ann Faragher SHALL RECOVER the sum of $51,841.25 in attorneys' fees from Defendants City of Boca Raton, Bill Terry, and David Silverman, jointly and severally.

(5) Plaintiffs Beth Ann Faragher and Nancy Ewanchew SHALL RECOVER the total sum of $8,169.42 in costs, with one-half of the total apportioned to each plaintiff. Plaintiff Faragher's portion of the costs award, $4,084.71, shall be taxed jointly and several against Defendants City of Boca Raton, Bill Terry, and David Silverman. Plaintiff Ewanchew's portion of the costs award, $4,084.71, shall be taxed against Defendant Bill Terry.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida this 27th day of March, 1995.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Brown
Peter J. Hurtgen, Esq.
William R. Amlong, Esq.
Stuart A. Goldstein, Esq.
Michael A. Burke, Esq.

EXCERPTS FROM TRIAL

DAY 1
JUNE 21, 1994

TESTIMONY OF NANCY EWANCHEW

Direct by Amlong
Page 39, lines 5-6; Page 40, lines 4-8; Page 42, lines 21-25; Page 43, lines 1-6

COURT	State your full name, please, ma'am
A	Nancy Ewanchew Oakland
Q	And did you previously work for the City of Boca Raton as an ocean lifeguard?
A	Yes, sir.
Q	Okay, And do you recall when you started?
A	Yeah, it was April 22, 1987, I believe.
Q	Approximately, how many lifeguards worked for the City of Boca Raton when you first went to work there?
A	I believe there were approximately 20 a day.
Q	And how many of those were men and how many of those were women?
A	There were six women, I believe.

Q Okay. Can you name them?

A Beth Faragher, Jamie Harrington, Kelly Evans. Gail and I came later in my employment, and so did Betty Leen, I believe I'm forgetting a few of them but I just don't recall at this moment.

Page 45, lines 15-25; Page 46, 47, 48, lines 1-25

Q Now, after you began working at the City of Boca Raton, and you told us that initially you got along well with Mr. Terry. Did there come a time at which Mr. Terry acted or spoke to you, acted towards you or spoke to you in what you considered to be an inappropriate manner?

A Yes.

Q All right. Please tell Judge Highsmith about the first such incident that you recall.

A It was probably within the first week and he came up to me and put his arm around me and pulled me real close to him. And I moved away as quick as I could. And I — and also he, I was having a problem, I was going to get married and the marriage didn't work out and I decided that it wasn't a good idea. And I mentioned something to one of the girls that was present there, quietly. And then I guess he overheard it and said loudly in front of everybody in the headquarters — and there were a lot of people there — well, men just don't marry a girl like you.

COURT I'm sorry. Move that microphone over just a little bit toward me. Now what was the last remark you made?

A Bill Terry said that men don't marry a girl like me, that guys don't marry a girl like you is what he said.

COURT All right.

Q And how long, how soon after that, how soon after you became an employee did that happen?

A It was approximately a month.

Q Okay. Were there other incidents in which Mr. Terry spoke to you in a manner that you considered to be inappropriate?

A Yes. He, many times — it was like once a week or once every two weeks he would say something either under his breath or directly looking at you, saying, you know, that this girl on another beach patrol is a C-U-N-T and that a beach patron that was a friend of mine that I used to walk on the beach with once in a while, he said that she slept with all of the male lifeguards and that she was a slut. And that she was, you know, wasn't, shouldn't be around here and cause trouble.

I heard him make derogatory remarks about the other women. And it was behind their back that he would say it. But he would look right at me and say as if he was directing it at

me.

Q Miss Ewanchew, I know that you don't like some of these words, but you need to be more specific than to simply say that he made derogatory remarks. What precisely did Mr. Terry say about other women on the beach patrol?

A He would call them, he would call them cunts and sluts and bitches and he would just say that they shouldn't be out there and that they didn't have a right to work there. And when a promotion came up, I can explicitly remember him saying, That bitch would never get the job, I would never hire her.

And it was like once a week that you would have to hear that kind of garbage. And he would touch you and put his hands on you and reach towards you, your breast in a crowded room right behind people that were standing there, he would reach around and laugh at — I'm sorry. I apologize. I'm sorry.

Q Did you ever hear Mr. Terry make similar, did you ever hear Mr. Terry refer to male lifeguards by any slang for male genitalia?

A No.

Q Did you ever hear Mr. Terry comment on the promiscuity of any male lifeguard?

A No.

Q Now, other than the woman on the beach patrol, did you ever hear Mr. Terry make similar comments about and/or to women who weren't on the beach patrol?

A Yes.

Q Okay. Who? And what were the circumstances and what did Mr. Terry say?

A One of the lifeguard's wives came by the beach patrol often.

Q Who was that?

A Janet Yard (phonetic). And he called her a big mouthed bitch and called her a slut, and there was another girl, that girl I spoke of earlier, her name is BJ.

Q Was that the friend you would walk with?

A Yes.

Q How about a woman by the name of Sonya, do you recall Mr. Terry making any, do you know who Sonya was?

A I didn't know her personally, and I had never met her before. And the first time I ever heard of her was I heard Bill say, She's the cunt on the other team. And there is no way that she will win the race. And he was talking about her as a competitor. And I didn't even know her.

Page 49, lines 1-7 and 20-25; Page 50, lines 1-25

Q What kind of teams are we talking about here?

A Competition team.

Q For what?

A Lifeguard tournaments.

Q And was Sonya the only person that Mr. Terry characterized that way during lifeguard competitions.

A No.

Q Do you recall any other lifeguard competitions other than the one involving Sonya in which Mr. Terry commented upon the women opponents?

A I heard him make general statements towards the women's teams of other beach patrols, I heard it a couple of times.

Q What kind of general statements, what words?

A That we'll beat the bunch of bitches.

Q To whom did he make these statements?

A I believe he made them to a couple of the lieutenants.

Q To whom did he make the statement about Sonya?

A I believe that there was a beach patrol captain present. I think it was Pat McGowan or Rich Morrison.

Q Was it within hearing of, well, obviously you heard it?

A Oh, everybody heard it that was standing in the outer office.

Q Okay. Do you recall who was standing in the outer office? Were there any women?

A Yes, there were a lot of women there. Beth was there and I believe possibly Jamie heard it, but I'm not really sure.

Q Did you ever hear Mr. Terry make any comments about Elizabeth or Betty Leen, that's L-E-E-N?

A Yes. He said that she had big tits and when God was handing out tits the that she was at the head of the line.

Q Do you know whether or not he said this — well, to whom did he say this?

A He said it in a general ear shot of everybody that was standing there in that morning.

Q Was Miss Leen there?

A Yes, she was.

Page 51, lines 1-25; Page 52, lines 1-25; Page 53, lines 1-22

Q Do you recall a woman by the name of Kendra, K-E-N-D-R-A?

A I didn't know her personally, but I heard her referred to as a bitch.

Q And there was a lifeguard there named Eddie Wright?

A Yes.

Q And he had a girlfriend named Joan?

A Yeah.

Q What, if anything, did Mr. Terry say about Mr. Wright's girlfriend Joan?

A That she was, that she slept around and that she was sleazy.

Q What, if anything, did you hear Mr. Terry say about Beth Faragher?

A He said that she was man like and that she didn't have a chest.

Q And did Mr. Terry ever comment on the physique of male lifeguards?

A No, sir.

Q Did you ever hear Mr. Terry make any remarks

about your friend Kelly Evans?

A I don't remember him saying anything but I do remember him touching her all the time.

Q How would he touch her?

A He would pull her in real, grab her on the shoulder and pull her in real close and put his hand around her waist and grab her butt. And she was visibly upset by that.

Q Visibly upset is a conclusion. Tell Judge Highsmith what you saw her do, how did she act.

A She would scrunch her face up and move away and push away at him. And he would just hold on to her and laugh and look at her and laugh. Like it was funny.

Q Did you ever hear Mr. Terry make any remarks that you considered to be inappropriate about Jamie Harrington?

A I don't believe he said anything. I do recall that he referred to her as a bitch sometimes, but he touched and grabbed at her all the time, too.

Q How about Gail Nye?

A They called her an array of names. She was called a bitch, a slut, a cunt, a clit.

Q When you say they, who is they?

A Well, David Silverman and Bill.

Q Now, when you worked for the beach patrol did you get annual personnel evaluations?

A Yes.

Q And do you know whether or not your annual — did you get any annual pay raises?

A I believe so.

Q And do you know whether your pay raises were a function of your annual personnel evaluation?

A I believe they were.

Q And if you got a good evaluation you would get a pay raise?

A Yes, sir.

Q And who performed your job evaluations?

A Bill Terry.

Q And Mr. Terry hired you as well, correct?

A Yes.

Q Now, when you were employed there, I believe during the entire time, David Silverman was a lieutenant, correct?

A Yes.

Q And did you consider David Silverman to be your boss?

A Yes.

Q And tell Judge Highsmith why you thought that Mr. Silverman as a lieutenant was your boss?

A He told me point blank that in the tower one day that it was real rough, he says, well, you will be making the rescue because I'm your boss. Referring to the fact that he didn't want to go in the water and get wet and that because I was the junior guard that I would be responsible for making any rescues. That I had seen him make supervisory and disciplinary decisions to people, to other lifeguards. And basically he had input on the evaluations as well.

Page 54, lines 2-25; Page 55, lines 9-25; Page 56, 57, lines 1-25; Page 58, lines 1-22

Q Did there come a time after you began working for the City of Boca Raton at which Mr. Silverman, at which Mr. Silverman spoke to you in what you considered to be a sexually inappropriate manner?

A Yes.

Q How long after you met him did that — how long after your first meeting with Mr. Silverman did that occur?

A It was within a week. It was within a week of starting.

Q Where did the first incident take place?

A I believe at headquarters.

Q Do you remember what Mr. Silverman said to you?

A I don't recall exactly what he said at the time.

Q Were you alone with him?

A We were in the headquarters and there were a lot of people around and he was making jokes about the girls on the beach, jokes like, you know there are so many girls on the beach today and there are so many tits on the beach today, and that if it was a rainy day —

Q Right now, Miss Oakland, I'm trying to confine you to the first meeting. Did he say all of these things during the first meeting?

A No.

Q Okay. What, if anything, do you recall about what Mr. Silverman said during the first meeting?

A I believe it was a statement about tits, something about tits:

Q Do you generally refer to your breasts as tits?

A No, sir.

Q Tell Judge Highsmith what other remarks that you recall David Silverman making that you considered to be sexually inappropriate?

A I heard him say what he used all the time when it was going to rain, if it was a 40 percent or a 30 percent chance of rain, he would say, oh, it's a 40 percent chance I'm going to get a blow job today.

And he mentioned, when I say — well, when he was my lieutenant and I had to sit with him all day, he talked about his sexual conquests with a beach patron that was drunk, and how he had sex with her in the back of his truck. And another lifeguard watched through the window. And I had to sit there and listen to all day his descriptions of what he did with this drunk.

And he often tried to get me in conversations, sexual type conversations. And one time he brought up that term helmet and I didn't know what it was, I didn't know what he was talking about. And I said, What's that? And then he went into a big description about, oh, it's the head of my, of my penis, and do you want to see him, and do you want to see my helmet.

And he bugged me about that for a long time after and he referred to the women that I worked with in real derogatory terms, using words, you know — he said about Betty Leen, he made fun of her breasts and how, made fun

of her and said that she hung out of her bathing suits and that she looked funny when she ran, that she bounced all over. And made fun of her.

And he made fun of Beth Faragher and said that she had a flat chest, and made fun of her about that. And said she had a tight ass. And I had to sit there and listen to him when he would come to my tower. And a girl would be sitting on the beach and he would describe beach patrons and say about their body. And he said a lot of things that were very inappropriate on almost a daily basis when I worked with him.

He would say things when you would be in the shower and pound on the door. And say that he would want to take a shower with you. And he said it to the other girls, too. And when he pounded on the door, he would shake the door handle and I was afraid he was going to come in.

And there were — we took showers, ended up getting a lot of girls to go in the shower at the same time because we were afraid that one of these days that door was going to open and we didn't know what was going to happen. Because he sounded crazy outside the door, saying he wanted to get — he said so many things that, so often, that it was disgusting.

Q Did you want Mr. Silverman to tell you about his sex life?

A No, sir.

Q Did you want Mr. Silverman to tell you about his member?

A No.

Q Did you want to listen to the, to Mr. Silverman's critique about the physiques of other women?

A No.

Q You told us that these comments would be made when he would come and sit with you in your lifeguard tower. What was Mr. Silverman doing coming to sit with you in your lifeguard tower?

A He was my lieutenant and he would make rounds on the beach and sometimes he would sit with you for a certain amount of time and say, you know, what he would call visit with the peach on his beach.

And other times I was scheduled to sit with him and be the second guard at a tower. And I'd have to sit there all day with him.

Q Did you ever tell Mr. Silverman that you did not enjoy this?

A Yes.

Q What did you tell Mr. Silverman, what adjective did you use?

A I told him he was disgusting.

Q What response, if any, did Mr. Silverman make?

A He laughed.

Q Did you ever observe Mr. Silverman engage in any pantomime?

A At the headquarters.

Q All right. And I don't want you to do it, but I want you to tell the judge what Mr. Silverman was doing at the headquarters.

A He was making faces like he was doing oral sex to a woman.

Q What sort of facial movements was he engaging in?

A Sticking his tongue out and licking in the air.

Q Who saw him do this?

A I saw him and I know there were other people, but I didn't look around to see who was looking.

Q Were there other women there?

A I believe there were.

Q Were you amused.

A Absolutely not.

Page 65, lines 11-24; Page 66, lines 5-25; Page 67, lines 1-25; Page 68, lines 1-6, 11-25; Page 69, lines 1-4

Q Now, when you worked for the City of Boca Raton, did you ever complain to any of your superiors there about the conduct of Bill Terry and David Silverman?

A Only one person and that was Flash, Robert Gordon.

Q And what job did Robert "Flash" Gordon hold at the City of Boca Raton?

A I believe he was in a position of either a lieutenant or a captain, but he was a superior of mine.

Q And do you recall any of the particulars of your complaint?

A I told him that the behavior from both David Silverman and Bill Terry was very offensive to me and I wanted him to see if he could do something about it or try to stop it or tell them to stop it. And I asked him what I should do.

Q What, if anything, did Mr. Gordon tell you at that point?

A He told me that the City didn't care and that just to basically just to stick it out.

Q Did you complaint to him again?

A Yes.

Q And what was the second complaint about?

A It was of the same nature and the same type of thing going on. And I couldn't understand why he couldn't do something, being a supervisor.

Q Do you recall a third conversation with Mr. Gordon during which you complained?

A Yes.

Q What was that about?

A It's the same. The same thing. I wanted him to do something about it and he said that I can't do anything, I'm powerless, that the City doesn't care and that there is nothing that can be done, and just to stick it out.

Q In addition to your complaining to Mr. Gordon, do you know if Mr. Gordon ever saw or heard any of the incidents of which you have told us?

A Oh, yeah. He definitely saw and heard.

Q Incidents involving Mr. Terry?

A Yes.

Q Incidents involving Mr. Silverman?

A Yes.

Q When Mr. Terry would touch you —

A He saw when he put his arm around me and around my waist, and that I moved away quickly and was very upset. We used to actually try to avoid Bill Terry. And we would try to dodge him. When we would know he would be standing at a certain place, myself and the other women would try to go to the other side of the room and avoid crossing his path.

Q Did you ever hear any other woman complain to Mr. Gordon, to Captain Gordon about Mr. Terry's behavior or Mr. Silverman's behavior?

A Yes.

Q Whom did you overhear complain?

A I overheard Jamie Harrington. And I overheard Beth.

Q What did Captain Gordon tell Ms. Harrington?

A Basically, what he told me, that there is nothing he could do.

Q What did Captain Gordon tell Beth Faragher?

A I believe it was the same thing he told all of us.

Q Did you complain to the other women about the treatment you were getting from Mr. Terry

and Mr. Silverman?

A At first we didn't go up to each other and say we're being sexually harassed or something, because we didn't really know what that term meant. We knew that we were being treated in a way that wasn't right and that made us feel uncomfortable. And through that, most of the woman began wearing towels around themselves and going into the shower room together and avoiding both gentlemen at all costs. And trying to be around —

Q Miss Oakland, why did you personally simply not go down to City Hall and say these people are talking dirty and grabbing me?

A I would have been fired. I believe I would have been fired.

Q Why do you believe that?

A I had seen over the years, over these two years that I worked there, incidences where when somebody — for example, on Janet Yard. When her husband was upset at how Bill Terry spoke to his wife he put them on bad towers.

Q Who is he and who is him?

A He put Bill, Bill Terry put Bob Yard at bad stands where they didn't have proper sun protection or missing a wind screen. And would put them on the undesirable, like a shift that he didn't want to be on. Because they had a morning shift and a late shift. And I saw him

do that to other people. Using his supervisory capacity to punish people if they did something that he didn't like. So I felt sure that I would have been fired if I went there.

Page 71, lines 10-25; Page 72, lines 1-15

Q Miss Ewanchew, did you eventually come to write to the City of Boca Raton a letter concerning what had happened to you on the beach?

A Yes.

Q And when did you do that?

A In April of '90.

Q What prompted you to write the letter to the City of Boca Raton a year after you had left?

A After I had left I heard there was still things going on on the beach patrol. By things I mean inappropriate language and behavior. And I heard that from Beth. And also I remember one time when I was in Publix, Vicki Bonner, which I really didn't know who she was except that she worked for the City as a lifeguard, came up to me and was visibly upset and crying. And wanted to talk about the harassment that was going on out there and what was happening to her.

So after those two incidents from Beth and from Vicki, and then just the fact that I really felt that something, somebody should say

something about it so that it stops, I wrote the letter.

Q How long were you on probation for at Palm Beach County?

A One year.

Q Did you write the letter after you got off probation?

A Yes.

Q What concerns, if any, did you have about Mr. Terry speaking ill of you to your new bosses?

A I was very concerned because I had heard from when I worked at the City of Delray that a supervisor, he had come and spoke to a supervisor and told him that I was a poor employee and that I didn't report to work on time and things like that.

Page 77, lines 12-22; Page 78, lines 2, 4-6, 10, 25; Page 79, lines 1-4

Q When you first came to work for the City of Boca Raton, Miss Oakland, what, if anything, were you told about the City's policy on sexual harassment?

A When I was hired, nothing.

Q Did there come a time later when you were told what the City's policy on sexual harassment was?

A I don't recall ever being told anything.

Q During, during the two years that you were employed by the City of Boca Raton, Miss Oakland, what, if anything, did the City do to affirmatively raise with you, or any other employees that you know of, the subject of sexual harassment?

A Nothing.

Q During those two years, Miss Oakland, what, if anything, did the City of Boca Raton do to express to you and other employees its strong disapproval of sexual harassment?

A Absolutely nothing.

Q Miss Oakland, during the two years that you worked there, what, if anything, did the City of Boca Raton do to let you know about your rights to raise and how to raise the issue of sexual harassment?

A It did nothing.

Cross by Hurtgen
Page 82, lines 18-25; Page 83, lines 1-13; Page 87, lines 20-25; Page 88, lines 1-2; Page 93, lines 1-5

Q Well, it's hard to describe banter. Take the word banter out. Did the men and women with whom you worked use sexual terms in a joking or light way in a fashion that you found not - offensive?

A Yes.

Q And that would generally occur in the vicinity of headquarters and/or the locker room, correct?

A Yes.

Q That's where most of you as groups were, isn't it?

A Yes, at certain times of the day.

Q Right, I understand that. And if I understand what you have told us before, you yourself participated in that good natured sexual joking from time to time, correct?

A I don't know what you mean by participated in it.

Q Well, did you use such words in the conversations yourself?

A What words?

Q Any words relating to the sexes, sexual conduct, attitudes about sexual relations, anything having to do with teasing or joking amongst men and women as it relates to sex?

A Yes, I did.

Q Well, that's the question. Offensive to you. That is sexual remarks by Mr. Gordon that you found to be offensive. And your answer is no?

A No.

Q But you did hear him make sexual remarks?

A Yeah, he may have once or twice.

Q Okay. But that you didn't find them offensive?

A No.

Q All right. When you commenced your employment with the City you received an employee handbook, is that right?

A Yes.

Q And you signed a receipt for that, do you recall that?

A Yeah.

Cross by Burke
Page 127, lines 21-25; Page 128, lines 1-6

Q Okay. And then the bulk of the work day, that is the time that you are spending out there in the tower watching the ocean and the beach patrons to make sure that things are proceeding as they should, you would not have contact with Mr. Terry, isn't that true?

A Yes, but we still had contact with him.

Q Well, sometimes he would come by the stand, true?

A True.

Q During the course of your two years of employment that happened about 12 times, correct?

A Approximately.

TESTIMONY OF JAMIE SUE HARRINGTON

Direct by Amlong
Page 132, lines 17-23; Page 134, lines 1-4, 12-25; Page 137, lines 1-25; Page 138, lines 1-22

Q Good afternoon, Miss Harrington. My name is Bill Amlong, I represent Nancy Ewanchew and Beth Faragher. You worked for the City of Boca Raton as an ocean lifeguard from February 1986 through December 1991?

A That's correct.

Q And most of that time you were part-time?

A Yes.

Q Did you ever hear Mr. Terry make any remarks that you considered to be sexually inappropriate about any of the women lifeguards?

A Yes.

Q Let me direct your attention to a time when, do you remember a lifeguard by the name of Vicki Bonner?

A Yes.

Q And do you recall an instance when Miss Bonner left the headquarters — when you are in the tower you have a radio, right, so you can keep in contact with headquarters and the lieutenant?

A Yes.

Q And do you recall an incident during which Miss Bonner left the headquarters without her radio?

A Yes.

Q And do you recall Mr. Terry commenting on that?

A Yes.

Q Would you — and this was within your earshot?

A He said it directly to me.

Q Please tell Judge Highsmith what Mr. Terry said about Miss Bonner leaving without her radio?

A He said, I can't believe the stupid cunt forgot her radio.

Q Now, do you recall him ever making any other unflattering remarks about women lifeguards?

A Yes.

Q Would you please tell us what they were.

A I remember after a competition that I competed in this other lifeguard from a different beach patrol, Sonya Booth was her name, and I beat her by just about five seconds, I guess. And he said, The bitch almost got you.

Q Do you mean generally, in your conversations with Mr. Terry, would you refer to women as cunts and bitches?

A Can you please repeat the question?

Q I said when you had conversations with Mr. Terry that you initiated, did you generally refer to women as either cunts or bitches?

A I refer to them as that?

Q Yes. Did you?

A No.

Q Do you consider those to be inappropriate words for reference to women?

A Yes.

Q Do you recall an incident when you appeared for work and the day was rather chilly and you had a conversation with Mr. Silverman that morning at headquarters?

A I don't recall that particular day, but I do recall a day coming to work, I mean, when I've had a conversation with him.

Q And did Mr. Silverman make any remarks about your appearance on that rather chilly day?

A That it must be cold out because my nipples were showing. Maybe not in those exact words, but reference to my nipples were showing because it was a cold day out.

Q Did you generally prefer to discuss your nipples with Mr. Silverman?

A No.

Q Did you consider Mr. Silverman to be your boss?

A At one time, when I was employed with the City, yes, I did, yes.

Q Tell the judge why you considered Mr. Silverman to be your boss; what, if anything, did he ever say to suggest that he was your boss.

A Well, the way it was said, the City was set up, I was considered an ocean lifeguard, when I was working he was considered a lieutenant. And at that particular time the lieutenants, there was like a lieutenant that was assigned to, I'm not sure exactly how many lifeguards, but for a particular day a lieutenant was your

boss for that day or your direct supervisor for that day. And you know, if you had a problem or something, you would call him first. So I would consider him to be my supervisor for the day.

Q Did you ever hear Mr. Terry — I'm sorry. Did you ever hear Mr. Silverman make any other remarks — strike that. Let me ask, did you consider the remarks about your nipples to be inappropriate?

A Yes.

Q Did it make you feel uncomfortable?

A Yes.

Q Did you ever hear Mr. Silverman make any other remarks about women that you simply felt were inappropriate and that made you feel uncomfortable?

A Yes.

Q Could you please tell the judge about them?

A I remember one time when he was my lieutenant and we were sitting in a tower together.

Q Why was he sitting in the tower with you?

A Oh, I'm sorry, well, because sometimes lifeguards and lieutenants would sit in the same lifeguard towers together.

Q So he was sitting with your because he was your lieutenant?

A Yes. But we could also be sitting in the same area, I could have been in a different lifeguard tower but he still would have been my lieutenant for the day.

Q But he is with you that day because he is your lieutenant, and what happens?

A Well, during my eight-hour shift I would sit with him for about six hours, because I'd have an hour lunch, and at this particular incident I recall we were sitting there and he was eating some food and a woman walked by and he said, Oh, I'd love to eat between her legs.

Q Did that impress you as being an appropriate comment for him to make?

A No.

Q Had you ever discussed oral sex with Mr. Silverman?

A Not that I recall, no.

Q Did that make you feel uncomfortable?

A Yes.

Q Now, you were something of a star on the lifeguard team, correct?

A I guess you could say that, yes.

Q And you got some publicity concerning that?

A Yes.

Q And do you recall a conversation with Mr. Terry during which Mr. Terry suggested how or why you possibly had gone gotten such publicity?

A Yes, I remember a reporter from the Boca News had done a story about me and Mr. Terry asked me if I had slept with him.

Page 139, lines 19-25; Page 140, lines 1-8, 16-24

Q Did you consider it to be okay that Mr. Terry was asking you whether or not you were sleeping with a reporter?

A No, I didn't.

Q Did you ever voluntarily discuss your sex life with Mr. Terry?

A No.

Q Did there come, did there ever come a point when Mr. Terry touched you in a way that you felt was not appropriate?

A Yes.

Q Would you please tell Judge Highsmith about that incident?

A I remember one time when I was standing in

the lifeguard room and I was getting ready to punch out, punch my time clock out, and he put his hand like on my thigh and I punched him in the arm and I said, What are you doing? And he walked away in the office after that.

Q Did you ever complain to — do you know a lifeguard, a former lifeguard captain by the name of Robert Flash Gordon?

A Yes.

Q Did you ever complain to him, Captain Gordon, about the inappropriate sexual behavior of Messrs. Terry and/or Silverman?

A I don't remember complaining to him, no. I might have mentioned things that were said or happened, but I don't remember formally complaining to him.

Cross by Hurtgen
Page 141, lines 8-14; Page 142, lines 1-25; Page 143, lines 1, 22-24

Q The remarks that you have told us about from Mr. Silverman that you found offensive all occurred while he was a lieutenant, is that right?

A Yes, that's correct.

Q And I believe you have said that when he became a captain he cleaned up his act, is that right?

A Yes, that's correct.

Q Did you ever talk with any of the other women lifeguards while you were employed there about these instances of offensive words that you have told us about?

A Yes.

Q Okay. And with whom did you discuss it?

A It was, I guess, after, I guess, the City had started making inquiry about what was going on.

Q After Nancy Ewanchew wrote to the City to raise the question, is that right?

A That's correct.

Q Okay. And there came a time when you were interviewed by Mr. Bender, the personnel director, is that right?

A Yes.

Q Okay. And do you recall whether that occurred in, sometime in June of 1990?

A I can't remember but that's probably about right.

Q All right. Did the first time that you discussed it with anybody else besides Mr. Bender, when you did, was that at a meeting at Nancy Ewanchew's apartment?

A Yes.

Q Okay. And that was after Nancy had left, correct?

A Yes.

Q All right. Prior to that time at Nancy's apartment did Nancy or any other women lifeguards tell you there had been any touching or offensive words by Terry or Silverman?

A Not that I can recall.

Q Did you enjoy your work for the City as a lifeguard in those five years that you were working there?

A Yes.

A Yes.

Cross Examination by Burke
Page 144, lines 6-24; Page 145, lines 7-19

Q Afternoon, Miss Harrington. My name is Michael Burke. With respect to this incident where Mr. Terry in referring to Miss Bonner, called her a stupid blank, Beth Faragher and Nancy Ewanchew were not present, correct?

A Yes, that's correct.

Q With respect to the time wherein Mr. Terry touched your thigh and you punched him any [sic] in the arm, Beth Faragher and Nancy Ewanchew were not present, correct?

A Correct.

Q Now, Mr. Terry didn't do that again, I take it, after you punched him in the arm?

A No.

Q You were not disciplined following that in any way that you felt was unfair, correct?

A That's correct.

Q You never told Mr. Terry on these occasions wherein he used these vulgarities in your presence that you were offended and wished him to stop using that language, that's correct?

A That's correct.

Q Nancy Ewanchew Oakland never complained to you that Mr. Terry had harassed her in any verbal or physical way; is that correct?

A To the best of my knowledge, that's correct.

Q She did not make such a complaint to you?

A Yes.

Q Same question with regard to Beth Faragher, during the occasions when you spoke with one another Beth Faragher never complained about Terry in terms of sexual harassment, correct?

A Correct.

Q From what you could see Nancy Ewanchew and Beth Faragher enjoyed their work at the City of Boca Raton, correct?

A Correct.

Cross Examination by Goldstein
Pages 146, 147, lines 1-25; Page 148, lines 1-10; Page 149, lines 5-18

Q Miss Harrington, my name is Stuart Goldstein, we've met before. I represent David Silverman. I just have a few questions for you. With regard to the approximately comment that you attribute to Mr. Silverman about your nipples, can you tell us about when that occurred?

A I can't specifically pinpoint a date. I know it was when he was a lieutenant. It definitely wasn't when he was a captain. So I can't, I don't want to just throw out a date and say well, it could have been this date.

Q Can you pinpoint a year?

A '89, '88.

Q But you are not sure?

A No, I'm not sure.

Q Whenever it occurred, were either Miss Faragher or Miss Oakland then Ewanchew present?

A No.

Q And the comment that you attribute to Mr. Silverman would be the beach patron that walked by, or the woman that walked by, can you tell us when approximately that occurred?

A Again, I can't think of a specific date.

Q Just approximately.

A Approximately '88, 1988.

Q But you're not sure?

A But I'm not sure of that, no.

Q Were either Miss Faragher or Miss Ewanchew present?

A No.

Q Was that a tower also?

A Yes, that was a lifeguard tower.

Q So these two incidents occurred approximately within a year of each other?

A Yes.

Q As best you can recall?

A As best I can recall, yes. Within a year.

Q And you don't remember complaining to

acting Captain Gordon about either of these incidents?

A No, I do not.

Q Did you consider him your friend?

A Yes.

Q And he was an acting captain at the time?

A I believe so. Our training, my understanding, I thought he was a training officer.

Q All right, but there were captains —

A Yes.

Q — that you could have gone to, if you wished, to complain about this? Could you have asked a captain to —

COURT Excuse me, was that a question?

GOLDSTEIN Yes, it was your Honor.

COURT All right. There were captains that you could have gone to and complained about this; is that correct?

WITNESS Yes, that's correct.

COURT All right. Next question

Q And I gather that you didn't complain to any captain about either of these incidents?

A No, I did not.

Q Or to anyone else?

A Any of the incidents described?

Q The two that you just described and that I have asked you about.

A No.

Q You testified a moment ago that after Mr. Silverman became a captain he, to use your term, cleaned up his act. What did you mean by that?

A Well, he just seemed like, I mean, I didn't hear him say anything comments or any, like I had testified earlier, I didn't hear him say anything with reference to my nipples after that. I mean, he just seemed like he was going by the book and that's what I mean by cleaning up his act.

Q Isn't it true that other than the two incidents that you have referred to that you didn't hear Mr. Silverman say anything derogatory in a sexual way about or toward women other than these comments to yourself?

A Nothing I can recall, no, to the best of my knowledge, no, I can't remember anything specifically.

TESTIMONY OF ROBERT FRANK GORDON

Direct by Amlong
Page 152, lines 24-25; Page 153, lines 1-19, 24-25 Page 154, lines 1-11, 25; Page 155, lines 1-25; Page 156, lines 1-12

Q Now, during the time that you were employed by the City of Boca Raton as a marine safety captain, did any of the female lifeguard ever complain to you about what they characterized as being inappropriate, sexually inappropriate language?

A They did not use those specific words, but they complained about language and actions.

Q Okay. Who complained?

A Practically all of them that were working there at the time.

Q Jamie Harrington who just walked out, did she complain to you that you recall?

A Yes.

Q Nancy Ewanchew?

A Yes.

Q Beth Faragher?

A Somewhat, yeah.

Q Gail Nye?

A Yes.

Q Vicki Bonner?

A I don't remember specifically any comments from her, no.

Q What did Ms. Nye complain to you about?

A She complained about a number of things; specifically that there is one that I remember vividly.

Q All right, would you please tell Judge Highsmith about that?

A That she was working in the tower with Mr. Silverman one day and he had asked her to join him in the back of his vehicle at lunch time.

Q Please — I realize this is a formal setting and I realize you are somewhat uncomfortable with this language, because of your conduct during the deposition as well. But please tell Judge Highsmith exactly what words Miss Nye quoted Mr. Silverman as using to her?

Q Mr. Gordon?

A Specifically she said that he had invited her at lunch time to go back to his truck so that he could lick her clit.

Q As a marine safety captain you ranked immediately below Bill Terry, correct?

A There were two, two other captains and I believe, well, I'm not certain, I was a captain and training officer. There may have been again myself and the chief.

Q But you were a supervisor?

A Yes.

Q And Mr. Gordon, as a supervisor, what was your understanding about your responsibility as the, as a marine safety officer, a marine safety captain and training officer, if a subordinate complained to you about sexual harassment?

A No one had ever complained about sexual harassment to me. I never heard the word before this came up.

Q Okay. Well —

A But compliance of the nature of what we're talking about, my responsibility would, I suppose, be to try and resolve it.

Q Did the City of Boca Raton ever — the City of Boca Raton made sure that you knew how to swim, right?

A Yes.

Q And there were other tasks that you had to know to do, correct?

A Yes.

Q And you were tested on these tasks to make sure that you were competent to do them, correct?

A Correct.

Q And there were certain things that the City had. Well, for example, did the City have an insurance program, health insurance?

A Yes.

Q And did somebody from the City explain that to you?

A Yes.

Q Did the City have a retirement fund?

A Yes.

Q And did somebody from the City explain the pension plan to you?

A Well, we received pamphlets about whatever.

Page 157, lines 3-25; Page 158, lines 1, 10-12

Q What did the City tell you that you should do if a woman employee came to you and said, This guy is talking dirty to me, he is talking about sex? What were you supposed to do?

A I did not go to the City with the complaints from the ladies.

Q What did the City tell you that you were supposed to do if a woman employee came to and said, This guy had been groping me?

HURTGEN: Objection; he's asked and answered that questions.

COURT Well, I'm not sure.

A They never told me anything.

COURT Excuse me. Let me ask you a question, Mr. Gordon. Did you ever receive any instructions whatsoever about what you should do in the event any employee made a complaint to you about anything?

A Instructions, yes, from, in the form of how to write and the order of disciplinary action record cards.

COURT All right. You may proceed.

AMLONG Thank you.

Q Did you ever write a disciplinary record card on any of the complaints that you told us about from Gail Nye, Beth Faragher, Nancy Ewanchew?

A I did not record any of those, I didn't think it was my place to record card or discipline a supervisor.

Page 158, line 25; Page 159, lines 1-6, 12-25; Page 160, lines 1-7

Q Do you recall what conversation, if any, Miss Faragher said accompanied the tackle?

A Not specific words, but to the point that she had nice legs and ass but really no chest to speak of.

Q Do you recall when you gave your deposition Mr. Gordon and being asked what Mr. Faragher said to you?

A Yes.

Q Do you recall giving this answer: One thing probably I wouldn't forget, one morning she came up crying and she said that Captain Silverman had thrown her down in the sand and told her that if she had tits he would do her in a minute?

A Yes.

Q Did Miss Ewanchew ever complain to you about being touched?

A Miss Ewanchew complained probably more than any of the other women on the patrol, and her complaints were ranged from — everything, I couldn't remember them all. But she complained about language and being — I know she didn't like to be touched, period. But several times she complained about being touched.

Q When you say that she complained about everything, this trial is about matters sexual, sexual language and sexual touchings.

A I'm talking about she complained about language, she complained about some people only remember language and never complained about being touched. For her I seem to remember she was, I think that she was both verbally and physically harassed.

Page 160, line 25; Page 161, lines 1-25; Page 162, lines 1-23

Q Did Elizabeth Lee [sic] complain to you?

A Yes.

Q What would Miss Leen complain to you?

A Cracks about the size of her breasts language.

Q Did Miss Leen ever attribute to Mr. Silverman the use of any slang language in reference to her breasts?

A Yes.

Q What did she say he called them to her?

A Tits.

Q Did she appear to be happy that he had referred to them that way?

A No.

Q What, if anything, did you tell women lifeguards who complained to you, as we've just listed them, about whether or not they should go higher than Mr. Terry and take these complaints to City Hall?

A Well, I pretty much left that decision to them. But advised them that in the past there have been times when going to City Hall wasn't as productive as we had hoped it would be.

Q Do you remember during your deposition, Mr. Gordon, and Mr. Hurtgen this is on page 28 beginning at line 5: Question: You told Mr. Hurtgen that you had spoken to the women who had complained to you about taking their complaints about sexual harassment higher than Bill Terry. Did you advise them to do that?

Your answer was: I told them to pursue the sexual harassment issue was their ball. It was their game. I only advised them that in the past it seemed to some people, myself, others that have been with the City for years and years, and that they need to be careful.

Do you recall that testimony?

A Yes.

Q Does that refresh your recollection as to what you said during the deposition?

A Yes.

Q Does that refresh your recollection as to what you actually told Nancy Ewanchew and Beth Faragher and the others?

A Yes.

Q And did you tell them to be careful about going to City Hall?

HURTGEN Objection, asked and answered.

COURT Sustained.

AMLONG Your Honor, I was only trying to get that in as substantive testimony as opposed impeachment.

COURT Yes, well, in an abundance of caution — I understand his testimony, I understand his testimony to be that, yes, what he said in the deposition. Is that correct?

A Yes, that's correct

COURT Very well.

DAY 2
June 22, 1994

TESTIMONY OF ROBERT GORDON

Cross by Hurtgen
Page 2, lines 19-25; Page 3, lines 1-7; Page 9, lines 3-25; Page 10, line 1-21

Q The matters that you told us about yesterday

that some of the women lifeguards discussed with you were matters that you never personally witnessed; is that right?

A That's correct.

Q Okay. You never heard Mr. Terry or Mr. Silverman use offensive words, sex-type related words directed at those women in your presence; is that right?

A That's correct.

Q Okay. And you never saw any touching by Mr. Terry of any of the women lifeguards of an offensive nature, is that right also?

A That's correct.

Q You even spoke to Mr. Alexander, the director of the department, didn't you?

A Yes, I did.

Q Indicating that you thought it was wrong for the City to promote Silverman; is that correct?

A That's correct.

Q Okay. And prior to Silverman's promotion, you were his supervisor, weren't you?

A Yes.

Q All right. While you were his supervisor, did it ever come to your information from one of the

women lifeguards that Silverman was using inappropriate language in their presence?

A I believe so. I couldn't say with certainty.

Q All right. If it did come to your information, did you have any responsibility for correcting Silverman, counseling him, doing anything to cause him to not say those things?

A It would have been my responsibility to —

Q Okay. Did you do that?

A I don't believe so.

Q Did you tell anybody about Silverman, or yourself at the time with the City about Mr. Silverman's -- what was being said to you about his abusive words?

A I can't remember who I would have told.

Q Well, do you remember telling anybody is the question?

A In that time frame, I can't be sure.

Q All right.

I am not asking, sir, about any information you provided once the City began to investigate, I am not talking with after Ewanchew's letter, I am talking about prior to that when you were a Captain and Silverman was still a Lieutenant within your area of

responsibility.

Did you tell anybody at that time that you were hearing from some of the women that David Silverman was using raw, inappropriate language?

A I don't think I did.

Q Okay.

Was it also in 1990 when Ms. Ewanchew told you the things that you have told us about concerning the inappropriate language by Mr. Terry or Mr. Silverman?

A I believe it was.

Page 11, lines 23-25; Page 12, lines 1-15; Page 14, lines 11-25; Page 15, lines 1-25; Page 16, lines 1-24

Q When you were the training officer and captain, did you normally attend the morning workouts?

A Yes.

Q Okay. In fact, on most occasions, you were the planner and conductor of them, weren't you?

A That's correct.

Q And they were generally group activities, weren't they?

A For the most part.

Q. All right. Did you ever here [sic] Silverman or Terry say anything derogatory or sexually offensive about women in any of those morning workouts that you conducted?

A No, I didn't.

Q Did you ever see either – strike that.

Did you ever see Mr. Terry touch a woman lifeguard in an inappropriate way during the morning workouts?

A No.

Q You also spoke to Sandy Diello, didn't you?

A Yes.

Q Who was Sandy?

A I believe she was the Superintendent of Parks.

Q She was Mr. Terry's immediate boss; wasn't she?

A Yes, she was.

Q All right. And she came to the beach on regular occasions, didn't she?

A Regular, no.

Q Well, on occasion?

A On occasion.

Q All right. And you spoke with her when she — on those occasions that she came to the beach, didn't you?

A Yes.

Q And that is more than once?

A Yes.

Q All right. And you complained to her about that matter affecting the lifeguard world at that time, too, didn't you?

A Yes.

Q All right. Did you ever say anything to her concerning the complaints you had heard from some of the women lifeguards about Silverman's language?

A No.

Q All right. Why didn't you?

A I don't know.

Q Is it that while you thought it was inappropriate, it wasn't so frequent or severe or common or regular that it didn't merit taking it to that step?

A I know that initially I thought that, you know, we all used inappropriate language from time to time.

Q Okay. It was hard to know when that line got crossed, wasn't it?

A Right.

Q Because you did use yourself, even joking, teasing language that had sexual overtones to it, didn't you?

A Yes.

Q And a lot of other lifeguards did, too, didn't they?

A Most all of them.

Q All right. David Silverman did, didn't he?

A David?

Q David Silverman did, didn't he?

A I believe so.

Q All right. Did other persons touch the shoulders or the back of other lifeguards while you were employed there?

A We carried each other out. I don't know what you —

Q Well, were there familial touches, putting arms around shoulders, pats on the back?

A Yes.

Q An occasional pat on the fanny of somebody who just performed well in a swim, or something?

A Certainly.

Q And you didn't consider those to be offensive then, did you?

A No.

TESTIMONY OF VICTORIA BONNER

Direct by Amlong
Page 27, line 25; Page 28, lines 1-2, 12-13, 23-24; Page 29, lines 17-25; Page 30, lines 1-2, 14-25; Page 31, lines 1-2; Page 32, lines 19, 24; Page 33, lines 2-10, 17-23; Page 34, lines 1-6

COURT: Would you state your full name and your last name, please?

WITNESS: Victoria F. Bonner, B O N N E R.

Q And you previously worked for the City of Boca Raton as an ocean lifeguard?

A Yes.

Q Would you please tell Judge Highsmith what Mr. Terry said to you on the day you started?

Q As I was finishing up my interview, as I was walking out the door, he said, so, are you going to — the "F" word — or screw all the guys like the rest of the girls? I don't remember if it was

the "F" word or —

COURT I'm sorry. I can't hear.

WITNESS I can't remember which derogatory word it was. It was somewhere like those lines.

Q You interpreted that as a question to mean were you going to have sex with the other male lifeguards?

A Yes.

Q Do you recall an instance during which someone asked you to go into Mr. Terry's office and retrieve a pencil?

A Yes.

Q And who asked you to go into the office and get a pencil?

A To the best of my knowledge, Flash.

Q Meaning Robert Gordon whom you just saw walking out of here; right?

A Yes.

Q And when you walked into Mr. Terry's office, what if anything did Mr. Terry say to you that you considered to be inappropriate?

A It is not exactly what he said to me, as what I was told he said as I was walking out the door. I didn't actually hear him say the word, but I

was told by my lieutenant Scott Hall that he —

Q What did Mr. Hall tell you that Mr. Terry said of you?

A Scott Hall told me that Mr. Terry called me a cunt.

Q Did there ever come a time when Mr. Terry touched you in any way that you felt was not appropriate?

A Yes.

Q Would you please tell Judge Highsmith — was that once or more than once?

A One time.

Q Would you tell Judge Highsmith, please about the time that he — that Mr. Terry touched you in a way that you felt was not appropriate?

A I was at the time clock. I don't remember if I was punching in or punching out. Bill Terry came by and slapped me on the upper thigh. It wasn't a hard slap, he just came by and — like that. And that was it.

Q Did you enjoy that?

A No.

Q Did you disenjoy that?

A I did not enjoy that.

Q Did you find it to be offensive?

A Yes.

Q During the time that you were employed by the City of Boca Raton, did any of your superiors ever inform you of your rights as they relate to sexual harassment?

A No.

Cross by Stutin
Page 35, lines 7-19; Page 36, lines 7-9, 20; Page 37, lines 1-19, 21-25; Page 38, line 16; Page 39, lines 17-19; Page 40, lines 9-14

Q While you were working as a lifeguard on the beech [sic], what was the general environment like that you worked in? Describe the locker room for me.

A Very gross. The locker — there was no privacy for females. There was one bathroom, and — just the locker room was very small, and the lockers were very close together.

Q Okay. And the relationship amongst the lifeguards, was it friendly or —

A Yes.

Q Okay. And you did some socializing outside of work?

A Yes.

Q And you have also described one incident where Mr. Terry came and gave you a tap on the thigh?

A Yes.

Q He didn't hit you hard, did he?

A No.

Q Just a little tap?

A Right.

Q And then went on his way?

A Yes.

Q Was his hand on your leg for one second, that's it?

A (Nodding head in the affirmative.)

Q Okay. And were there any other instances like that by Mr. Terry where he touched your?

A No.

Q And were there any other instances by any other lifeguard where they touched you in some way you found offensive?

A Other lifeguards touching me?

Q Other lifeguards touching you.

A No.

Q And these two verbal instances and the one touching, did you discuss those with any of the other female lifeguards prior to Nancy Ewanchew raising the issue?

A I don't remember who I discussed it with. If I did, if I didn't, I don't remember.

Q And do you remember ever complaining to someone in City management?

A No.

Q Did you ever witness any statements that you would consider vulgar or offensive being made towards another female lifeguard, something you heard that was not directed to you?

A No.

Q And that is true for everyone; Bill Terry, you didn't hear any from him directed toward another female lifeguard?

A You were just asking me did I hear of Bill Terry saying anything to any of the other female lifeguards that was offensive; right?

Q Correct.

A No. I didn't hear anything, no.

Q Okay. At any other lifeguard. Is that true for all the lifeguards?

A I don't remember hearing any other lifeguards saying anything.

Q Okay. And did you ever see Bill Terry touch any other female lifeguard?

A No.

Q Did you have any problems at all David Silverman while you were employed as a lifeguard?

A No.

Q Did you voluntarily go to Dick Bender or personnel after this meeting to complain about these incidents that you have explained to us?

A Did I go to complain about this?

Q Did you, yes. Did you go to Dick Bender after?

A No.

TESTIMONY OF KATHRYN BUHR

Direct by Stutin
Page 45, lines 5-7, 16-25; Page 46, lines 1-11

Q Would you state your full name and spell your last name, please, ma'am?

A Sure. Kathryn Buhr, B U H R.

Q And did you at any time work the City of Boca Raton in the Marine Safety Section?

A When I was first hired.

Q And when was that?

A '89. November, '89.

Q And how long were you at the Marine Investigation section?

A Until September, '90.

Q All right. And what were your duties there?

A At Marine Safety headquarters?

Q Yes.

A Answer telephone, typing, payroll, clerical work.

Q And what was your normal work week?

A Monday through Friday, 8:00 a.m. to 5:00 p.m., with an hour lunch.

Q During the period that you were working Marine Safety, was Bill Terry the chief?

A Yes.

Q And was David Silverman there?

A Yes.

Page 48, line 25; Page 49, lines 1-17

Q And do you recall while you were working there ever hearing Bill Terry use offensive or vulgar terms of sexual nature?

A No.

Q And how about David Silverman, did you hear any foul language of a sexual nature from him?

A No.

Q Did you ever observe Bill Terry touch any of the female guards while you were there?

A No.

Q You didn't see him touch anyone's thigh or buttocks?

A No.

Q Did you yourself experience any touchings by Bill Terry?

A He leaned on my shoulder, and I only remember this because of what I was given to read. He leaned on my shoulder on occasion to put things in a basket that was on the desk, an in-basket, a work basket, and he kind of rubbed my neck on one occasion. It was a long time ago.

Cross by Burke
Page 52, lines 21-25; Page 53, lines 1-8

Q Am I correct, then, that you did not see Mr.

Terry touch any of the female lifeguards in any way that you found or observed to be inappropriate?

A No, I did not.

Q All right. And you did not hear Mr. Terry use any vulgar language directed towards women during the period of time that you worked with him?

A No, I did not.

Q And so that Judge Highsmith clearly understands this, you worked in the office with Mr. Terry day in and day out; correct?

A When he was in the office, yes.

TESTIMONY OF NANCY EWANCHEW

Cross by Goldstein
Page 87, lines 9-25; Page 88, lines 1-25; Page 89, lines 1-8

Q Good morning, Ms. Oakland. I ask you to excuse me in advance by calling Ms. Ewanchew today.

You testified yesterday that you had seen Mr. Silverman make supervisory decisions and disciplinary decisions regarding other lifeguards. Could you tell the court, please, any particular lifeguard whom you recall specifically about whom Mr. Silverman made supervisory disciplinary decisions?

A Yes.

Q All right.

Go ahead please.

A I saw David Silverman reprimand people both verbally and when he said that he wrote people up, and he told me when I was sitting in the tower with him, that I am the boss and I can do what I want to do.

Q That is not my question ma'am. My question is, for you to tell us the name of a lifeguard who you recall Mr. Silverman made disciplinary decisions about that you observed?

A No, I did not. I don't have any — I don't recall any names of anyone.

Q And you also said that he had input on evaluations. Do you recall that testimony yesterday?

A Yes.

Q Isn't that true, that — isn't it true that that was only when he was a captain?

A No, I believe as a lieutenant he had input on the evaluations.

Q And you say "I believe," so you are not really sure then?

A He led me to believe that he had input.

Q How did he do that?

A By telling me.

Q When did he do that?

A When I sat in the tower with him?

Q When was that?

A Numerous times.

Q And how did the conversation come up, that he led you to believe that he had input on employee evaluations?

A One day there was a really big surf, the day I brought out before about you have to make rescue because are the junior guards, in that same conversation I vividly remember that he said you better do a good job because I am rating you, and I — I understood that to mean rate me on my evaluation.

Q But you don't really know then that was within the purview of his duties as a lieutenant to have input on employee evaluations, in the formal employee evaluation form?

A We weren't allowed to know exactly what anyone did out there.

Page 93, lines 9-25; Page 94, lines 1-14

Q Now, Ms. Oakland, when you became employed by the City of Boca Raton, did you receive an employee handbook similar to this one that I am holding up?

A Yes.

Q It contained, did it not, provisions regarding probationary employees — I'm sorry, the probation period for employees?

A I believe it did.

Q And the probationary period for you was 180 days, wasn't it, back when you started?

A I am uncertain of that.

Q But you did understand from reading this book that after your probation period was over, you had access to the union's grievance procedure, did you not?

A Yes.

Q And you also understood from reading this book that you had access to the civil service process, did you not, if you had a complaint about something?

A I believe there was a civil service board in place. I felt uneasy about making any kind of attempt to complain about anything.

Q But you understood the process was there available to you?

A I believe that it was a process that was there set up, but I didn't really feel that it was there for me.

Q Did you know who the members of the Civil Service Board were at the time?

A No.

Q Well, did you think they had it in for you or if you complained to them you wouldn't get a fair hearing?

A No.

TESTIMONY OF BETH FARAGHER

Direct by Amlong
Page 124, lines 17-25; Page 125, lines 1-25; Page 126, lines 1-4

Q And did you previously work for the City of Boca Raton?

A Yes, I did.

Q Doing what?

A As an ocean lifeguard.

Q Okay. And when did you start?

A I believe it was in September of 1985. I believe it was September 26.

Q Okay. Was that your primary occupation at

the time?

A No. I worked as a lifeguard part time while I was attending college at FSU.

Q Is there a difference between a part time employee and what is known as a classified employee?

A Yes, there is.

Q What is that?

A A part time employee is — it is my understanding that they didn't have any protection. Their hours were more flexible. They didn't have guaranteed hours at the beach. They didn't get any benefits, like health insurance or any pension plans. We didn't get sick time or vacation time, you know any benefits like that.

And classified employees were basically guaranteed 40 hours a week. They worked full time. They got benefits, you know, including insurance. I think there might have been a pension plan. And it was, basically, my understanding that they had protection against being fired, you know.

Q To your understanding, did you have any protection against being fired? Did you have any civil service protection?

A No. None.

Q When you went to become a lifeguard, who hired you?

A I put in an application, and I went down to take a test. I believe the test was conducted by Bill Terry. I believe a couple of the captains were there. I think Rich Morrison was there, and Pat McGowan, and I believe Flash Gordon or Robert Gordon helped conduct the test.

Page 127, lines 4-25; Page 128, lines 1-25; Page 129, lines 1-13; Page 131, lines 22-23

Q Now, when you were at the City of Boca Raton, did you have any personnel valuations [sic]?

A I had personnel valuations [sic]? I don't recall if mine were annual. I think — they seemed sporadic to me.

Q Did you know who did those?

A I believe Bill Terry was in charge of those.

Q And what, if anything, did you understand these evaluations — or how often they might be — to have anything to do with your pay raise — pay rate?

A Basically, I believe that any and all raises were solely based on the evaluations.

Q What other authority, if any, did you think that Mr. Terry had over you?

A Basically, he had complete authority over me.

As a part time employee, I didn't have any protections. So if he wanted to fire me, it was my understanding that he could fire me.

Q Did you ever receive any oral reprimands?

A I don't recall if I received oral reprimands. I think the City's policy was to do most of their reprimands in writing, or maybe document them and still call them reprimands. But I remember a lot of paper work, and I did receive some of those.

Q And from whom did you receive some of those?

A Mostly Bill Terry.

Q Do you remember what they were for?

A I remember a few. I think one — I had forgotten to punch out, so I received, you know, an oral reprimand. I'm not sure, counsel, what they were called.

Others, I think — one day I came in and looked up at the tower assignment, say that, you know, I was at one tower. That sometimes got changed while we were working out. I didn't look again before I went out to my tower, so I ended up going to the wrong tower. And I am sure there were others, but, you know, right now, I don't really recall what they were.

Q When you were hired, did you meet David Silverman?

A Yes, I did. I don't remember if he was there when I took the test, but I met him afterwards.

Q And what was Mr. Silverman's job at the time?

A When I got hired, Mr. Silverman was basically a Marine Safety Lieutenant.

Q And did you consider Mr. Silverman to be your supervisor?

A Yes, I did.

Q What did that supervision involve?

A As a lieutenant, he would be basically supervisor of the beach that he was on that day. There are three beaches in Boca Raton. They had usually one scheduled to each beach, so anything on the beach that happened that day had to be reported to the lieutenant before we even called downtown, or down to headquarters.

Q Okay. Did a lieutenant have disciplinary authority over an ocean lifeguard, as you understood it?

A Yes.

Q And did you ever receive any in writing from the City saying who your first-line supervisor was?

A I believe I did. I believe that there was a memo sent out by the City saying that

lieutenants were our immediate supervisors.

Q And from whom was that memo?

A I believe it was from Bill Terry.

Page 133, lines 9-25; Page 134-135, lines 1-25; Page 136, lines 1-14, 22-25; Page 137-142, lines 1-25; Page 143, lines 1-2

Q Ms. Faragher, how often did you come in contact with Mr. Silverman?

A As a part time employee, I only worked at least — for about the three or four years I was on the beach, I usually just worked weekends, and then, you know, school breaks. So it seems that Mr. Silverman worked a lot of the same times I did. So in the beginning, I probably saw him two to three times a week, or worked with him two to three days a week.

Q Did you get along with Mr. Silverman to begin with?

A Yes, I did.

Q And did Mr. Silverman ever ask you to go out?

A Yes, he did.

Q Did you go out with him?

A I — actually, he asked me many times, and then one time I decided to go out with him as what I thought would be, like, a friend

relationship.

Q Okay. Tell Judge Highsmith what you all did.

A He came up to my house, picked me up. I think we went — I think we went to basically a pub in the old Boca Mall; I can't remember what the name of it was. Had a beer. And then I think before we went home, we stopped at Dirty Moe's in North Boca for a beer, and he drove me back to my house, which was right across the street.

Right before I tried to get out of the car, he tried to kiss me, and I basically pulled away. And, you know, I don't remember what I said, but then, you know, left the car and went inside.

Q Did Mr. Silverman continue to ask you to go out with him?

A Yes.

Q Did you wish to go out with him after that?

A No.

Q How early in your relationship with the City was that one outing.

A I can't say specifically, but it was probably within the first six, seven months of starting there.

Q Now, did there ever come a time when you

worked for the City in which Mr. Silverman spoke to you in a manner that you considered to not be appropriate?

A Yes.

Q Would you tell the judge about the first such incident that you can recall?

A Okay. I don't have the timing of the incident, you know, completely set in my memory, but I do remember a specific incident, and I am not saying if they are in order.

I remember one time, I think it was at beach headquarters, Mr. Silverman said something — I can remember the first part of the statement, not the last part. He said something, like, "Faragher, if your breasts got any firmer," and then he went on. I can't remember what he said after that, but, basically, he made a comment about the size of my breasts.

Q Had you offered your breasts to be critiqued?

A No. Not at all.

Q How did you feel when Mr. Silverman offered his opinion of your breasts?

A I felt embarrassed. Kind of, like, hurt. Disgusted. Basically, very belittled.

Q Had anybody in a work place environment ever before discussed your breasts?

A Never.

Q Can you recall any other instances?

A Many. And, again, I can't remember specific dates or, you know, years. You know, I can probably try to narrow it down. Another time I remember him making the comment, something, like, "nice ass."

Q Did you ever offer your rear-end to be critiqued by Mr. Silverman?

A No, I did not.

Q How did you feel when he commented upon that?

A Basically, the same kind of belittled, degraded, embarrassed.

Q Where did the "nice ass" comment take place?

A I believe during that incident, I was walking up the steps to headquarters, and he was walking behind me.

Q Do you remember an incident in which — was there ever any physical contact between you and Mr. Silverman?

A Yes, there was a couple of incidents. I believe the first one was in, maybe, my first year on the beach. I had been —

It was during a morning workout. I believe I

was coming back from a beach run, had run north on the beach, and had come back. I think it was in front of Tower 5, which is in South Beach Park.

Basically, Mr. Silverman came up to me, or he was running — I don't remember which direction, came up to me and tackled me into the sand, you know. Basically, you know, full body tackle into the sand, and I believe he said something, about, you know — I can't recall the specifics of what he said.

Q Did you ever tackle Mr. Silverman?

A No.

Q Have you ever been tackled by anybody at work?

A No.

Q What was the other touching incident?

A The other incident was — I believe the circumstances were similar. It was a morning workout. I had run down to — it was the Old Tower 10. It was about a mile north of the beach. I think it is Tower 12 now.

Right before I got to the tower — I should explain a little. There is a boardwalk that goes up from that tower and back into the park. It is maybe 100 to 150 yards long. Basically, he came up to me — I think he ran up to me, grabbed me around the waste[sic], threw me

over his shoulder, and proceeded to kind of run up the boardwalk with me over his shoulder.

And I kept saying, "Put me down. Let me go. Put me down." And he was laughing, and continued all the way up into the park with me on his shoulder.

Q Did Mr. Silverman ever say anything to you involving dating arrangements?

A Many times. He oftentimes mentioned —

Q Was this within the dating arrangements? Has everything that we have been talking about been within four years of the lawsuit for the two touching incidents?

A I am sure there are some bathing incidents that occurred before, but there are certainly bathing incidents that occurred — I guess that would put it in January of 1988. So, definitely, it would be the incident that occurred after that.

Basically, Mr. Silverman would often propose to me, usually after a morning workout, that I join him in the shower. Sometimes it would be at the outside shower, showering next to him. He would make comments about, "Hey, come on over and join me."

There were also incidents inside the headquarters. That was the only hot shower, basically, we had access to. There is one

bathroom.

Many times he would say, you know — he would be in the bathroom taking a shower, and say, "Come on in," or he would be heading in there and say, "Come on in."

And there are incidents where he would — where we would go — or, you know, sometimes it is me alone. Sometimes it was myself with, you know, maybe one, two, a few of the other female lifeguards, go into the bathroom to shower, and would, basically, hear catcalling out in the hallway saying, "Hey, let me come in and take a shower with you."

After a while, we, you know — I would go in there sometimes and lock the door, you know, if I was in there by myself. But, you know, in the beginning, I didn't do that, because there is one hot shower, and there was only a limited time for a person to shower. So in the beginning, I didn't do that. So he would come in or say stuff in the hallway.

So later on, we would go into the bathroom together, myself and some of the female lifeguards, and lock the door. So, basically, we could take a hot shower in peace. But oftentimes, even when that happened, Silverman would be banging on the door saying, you know, "Hey, let me come in and shower with you." That happened many times.

Q Other than the women — other than the

women banding together over the shower issue, was there any other sort of — for lack of a better word — heard behavior that the lifeguards documented?

A Yes, there was after, you know. Comments were made, physical things were done to us. And I know the other females started doing this. I started doing this too.

Even if we had the just had showered, we would throw a towel around ourselves to cover ourselves, or throw on one of our uniforms, even though they were still wet, throw on an old gray t-shirt and red shorts just so we wouldn't, you know, be standing there in our bathing suits, because we didn't — I didn't like, you know, making myself any more obvious than was necessary. So I tried to cover myself up to avoid unwanted comments and touching.

And other things I would do — and I think some of the other females would do this, during morning meetings — there is a locker room — there is a locker room behind the little foyer, the secretary called it, and most people would stand in the foyer during the morning meeting.

A lot of times — my locker was right inside the locker room door. I would stand in the locker room so I could, you know, hear the meeting, but just avoid being in the same small room close to Bill Terry and David Silverman. I would stand away or back in the corner to

avoid coming close to them.

Q Do you recall any conversations with Mr. Silverman involving a weather forecast that called for a likelihood of rain?

A I recall Silverman — Mr. Silverman making comments about, if there is 30, 40, 50 percent chance of rain, that there would be similar percentage change that he would get a blowjob in he back of his truck that afternoon or that day.

Q Did he ever make comments similar to that directed specifically at you?

A Yes. Again, it was way more than one time. I can't give you an exact number, but I remember many times on rainy days — like, I mean, coming back from lunch.

And at the time, Mr. Silverman had — I don't even know what kind of — it was an old truck, but, basically, he had the back of it set up almost like a camper-type thing. He would have, like — I don't know if there was mats in there, or, like, down. He had put, like a TV in there. I think he had a TV there at some point. Basically, a comfortable little place.

Because when I first worked out there, there was no protection against rainy days, so I would come back from lunch, and he would be sitting in the back of his truck, and he would say, "Why don't you come join me for the afternoon," you know. I would be heading

back to my tower, and he would say, "Come join me for the afternoon in the back of my truck."

And, basically, you know, to me, he was insinuating join me in the back of my truck and have sex with him. And as I said, that happened, you know, more than once.

Q Did her ever specifically suggest that you join him in the back of a truck to have a sex act?

A I don't recall if he specifically said, "sex act," but he would often invite me lewdly to join him in the back of his truck.

Q Why do you say "lewdly"? What about his invitation struck you as being lewd?

A He would be smiling, and kind of excited, and raising his eyebrows, you know. That kind of behavior.

Q Other than talking about your firm breasts, did Mister — Did you ever hear Mr. Silverman — before I leave that, how did the shower comments make you feel?

A Basically, you know, I wouldn't know what to say. He was a supervisor, so I didn't want to, basically, get him really mad at me, because, you know, I didn't know what would happen if I did get him mad at me. But I felt, again, embarrassed, belittled, you know.

He would say — sometimes when other people

were around, I – you know, I don't want to be known as someone who, you know – just from his comments, as someone thought that we were involved.

He, you know, basically, lessened my self-esteem, you know. I felt like, you know, I had to be careful around him, you know, not even look at him, because then he would think that I was trying to lead him on, or something.

Q How about the invitations to his truck, how did you feel about the truck invitations.

A Again the same, like degraded, embarrassed, disgusted.

Page 143, lines 4-7; Page 144, lines 1-4, 11-15; Page 145, lines 4-25; Page 146, lines 1-25

Q Did any other woman lifeguards ever tell you that Mr. Silverman had asked her for sexual favors?

A Yes. I believe that Elizabeth Leen, Betty – as we called her –

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A Okay. I want to be sure about this. Someone told me – I am not sure if it was Elizabeth Leen, but someone told me that Elizabeth Leen had been propositioned by David Silverman to give him a blowjob in the back of his truck.

Q Other than the remarks about your breasts, did you ever hear Mr. Silverman discuss female breasts in any other context?

A Yes. When I was – when he was lieutenant, I would sometimes sit at the same tower with him.

Q He would come on rounds as a lieutenant?

A Yes. He would come on rounds to check up on the beach, to check up on the lifeguards. Basically, yes, doing his job as a lieutenant, and, you know, might join me in the tower for, you know, 15 minutes, half an hour, to check. Continue with the other –

Q Please.

A So, like, an occasion where I would be sitting with him in the tower, I would hear him make comments. And usually, you know, I was the only other person in the tower. Make comments about the breasts, either the size or the fact that he liked them of a beach patron that was probably sitting in front of us, you know, in that tower area.

Q Did Mr. Silverman use the word "breasts"?

A No. He would usually refer to them as tits, like, "She has nice tits," or that type of thing.

Q Did you ever hear Mr. Silverman use the words "tits" to describe a number for women?

A Yes, it was later on at the beach when I first started, there were only two female lifeguards, but after a couple of years, we had maybe from five to six lifeguards at one time.

It would be in beach headquarters, usually in the foyer area. We would usually come in, and the beach assignments for the day would be up. There are little tags with each lifeguard's name on it, and then lieutenants had a tag with a beach on the wall, and little hooks for where you were assigned that day.

I would hear by — he was then lieutenant, because this affected him. He would come in and look at the tower assignment and figure out how many females were on his beach. And I believe the incident overheard, there were three females on the beach, and, you know, he was kind of laughing, excited saying, "Oh, look, you know, I have six tits on my beach today."

Q How did that make you feel when you were on duty and Mr. Silverman was not talking about your breasts or your body parts, or asking you to engage in having sex with him, how did it make you feel when he commented on other women's body parts?

A It made me, you know — I would be embarrassed, because he was usually directing it at me, you know, and I don't refer to people like that.

I also felt, you know, disgusted, kind of — for

the fact that he was, you know — it seemed to me just degrading women, you know, as a whole, you know, just by the way he would refer to them. He never just — also disgusted me because of his lack of respect for women to refer to them in that manner.

Page 147, lines 5-7, 21-25; Page 148, lines 1-25; Page 149, lines 1-24; Page 152, lines 10-14 and 22-25; Page 153, lines 1-25; Page 154, lines 1-12

Q Now, I am going to switch focus on a moment to Mr. Terry. When you first went to work and you were hired by Mr. Terry, did you get along with Mr. Terry to begin with?

A . . . I would like to state, though, that, you know, they — soon after beginning work there, I heard things about Mr. Terry from some of the other lifeguards. Basically, negative things.

But this was a new job for me, and I was trying to, you know, say, well, these guys — well, they have their opinion. I am just going to give him the benefit of the doubt and go in with an open mind, with, you know, not a negative attitude towards him in the beginning. So in the beginning, I guess, you know, I did get along with him the little that I did see him.

Q Did there come a time when Mr. Terry acted or spoke to you in a manner that you considered — that you considered not to be appropriate?

A Yes. There were many touching incidents with

Mr. Terry. It just seemed, like, to me — when I was near him, he would be the type that, you know, would try to, you know, always touch, always touch, like, a female. He would grab me around the shoulders, grab me around the waist on one or more occasions.

At times, he would — I remember one incident specifically where I was sitting down, getting ready to go to a waitressing job that I had, and Bill Terry came over and kind of like patted the top of my thigh or patted my thigh and was rubbing it. I think that incident was in April of 1990.

Other incidents, he patted me on the butt or slapped me on the butt. I think that was probably when, you know, all I had on was a bathing suit. It wasn't, like, I didn't have shorts on, or anything.

Q How did it make you feel when Mr. Terry touched you?

A Basically, like, a piece of dirt. I felt like I was — I was almost, like, an object. I wasn't a human being. I was, like, an object there for not necessarily his pleasure, but there for him to do with what he wanted. I felt humiliated.

After a couple of incidents, just, you know, angry, frustrated, because I didn't feel like there was anything I could do about it, except like what I tried to do, you know, cover up, stand in the meetings in the corner, in the locker room. Avoid him, basically.

I remember on one occasion just being so angry and frustrated after an incident that I went down to the gym — and I can't even remember if I put on the gloves — this is after an incident with Bill Terry — just started, like, hitting on the heavy bag. Just take out some of my frustrations and anger.

Q About how many times in all did Mr. Terry touch you in ways that you felt were inappropriate?

A I can't remember a specific number. If I had to estimate, it would probably be between 15 and 30 times.

Q Spread throughout the course of your employment?

A Right. As I said, in the beginning, I didn't see him much, so it was usually, you know, later in employment, after, you know, I started working more.

Q Now, you mentioned that you said that you worked on the heavy bag and that you felt very frustrated because you didn't have anybody to complain to. Why did you not complain to somebody at City Hall and say, "These people are saying things and doing things to me that just aren't right"?

A Basically, I think I didn't complain because I feared retaliation if I did it. I felt like if I did complain, there was probably a good possibility that I would lose my job.

I had heard things. Basically, heard about people being retaliated against that had gone down to complain to City Hall, or — and I also had heard that, you know, even if people did go down to City Hall, basically nothing would happen because of it. It seemed like Bill Terry had absolute, like, control over the beach patrol and what happened there.

Q Did anybody with the City of Boca Raton ever tell you what the City's policy was about sexual harassment?

A The first time I saw the City's policy on sexual harassment was approximately May or June of 1990 after I had been out there for four years and eight or nine months. Before that, I had never heard and I don't recall seeing anything on the City's policy.

Q Under what circumstances did you see the City's policy?

A The City's policy kind of appeared after Nancy's letter was written. That is the first time that I truly got to read it. And, basically, when I read it, it was like — I thought that this is exactly what these men having doing to me.

And the City's policy said that, you know — I am not sure exactly what it said, but it said that is our policy, not to allow things like this to happen. And the first time I saw it was, as I said, in May of 1990. I know after Nancy's letter was written, somebody got a copy of it and I saw it then for the first time.

Q You realize now that you can't fire somebody because they complain about something that is made illegal under Title 7, don't you?

A Yes.

Q Did you realize that then?

A No, I didn't realize it. And just from my impression and working out there for a long time, it seems like Bill Terry could do things that, you know, if I had known it was wrong, do things that I thought were completely wrong and get away with it, because the City — or the people at City Hall would back him up or support him, and cover it and just let it be.

Page 155, lines 11-25; Page 156, lines 1-4, 20-25; Page 157, lines 1-13

Q Before we get to the session in Mr. Bender's office, did you ever witness Mr. Silverman engaging in any pantomime?

A Yes, I did. I don't remember the number of times, but I remember it was in beach headquarters. I think it was, you know, right before or after a morning meeting, but I remember him basically lifting his head up in the air and, like, looking, sticking his tongue out, and licking in the air as if he was performing oral sex on a woman.

Q Did he say anything at this point or did he just make the motions?

A I don't recall if he said anything. I do remember the motions, though.

Q How many people were around?

A I'm not sure. I would be making an estimate. Maybe six to twelve people were there.

Q Did this occur on more than one occasion?

A I remember one incident clearly. As to other occasions, you know, I don't recall if he did, but I do remember one incident clearly.

Q What, if anything, had you heard, Ms. Faragher, and from whom did had you heard it.

COURT Well, I'm sorry. I don't want to interrupt, Mr. Amlong. I want to move that along. Were you aware of the reputation of Mr. Terry in the department, all right, for sexual misconduct? Now, the answer to that question is "Yes" or "No."

WITNESS Okay. I have a question before I answer that.

COURT All right.

WITNESS Who do you mean in the department?

COURT I am talking about among the greater employees of not only the fire — the lifeguard unit, but city employees in general.

WITNESS Okay. Yes.

COURT All right. What was that reputation?

WITNESS Basically, Bill Terry had a reputation for making sexual advances on young teenagers. From what I had heard, it was often young softball girls that he coached.

Cross by Stutin
Pages 197, 198 lines 1-25; Page 199, lines 1-6

Q But you did — you were ready to come back and start working again in August of 1986?

A Right.

Q Okay. And then you worked at the City for another — until the following summer, though the school year?

A Yes.

Q And then, again, you took a summer leave of absence?

A Yes, I did go up that summer.

Q And then, again, you returned back to your job at the beach in the City — that would be '87?

A Yes. I am trying to figure out the years.

Q And then you did the same, you worked ~~th~~rough the school year, '87, '88. And did you graduate in 1988?

A Yes, I did graduate in April of 1988.

Q Okay. And did you take a job in a retail store of some kind after you graduated?

A Summer of 1988? I believe that I — I am not sure how long I went up for it. I believe I went to Ohio for part of the summer, returned to the beach patrol in, you know, August or September of 1988. I continued working at the beach patrol while I looked for a, you know, a job in my field, which was management. Obtained a job in a retail store and worked full time, and still worked occasionally on the beach.

Q. Okay. So you left working the beach the entire time that you eventually got a full time job at a retail store?

A Right.

Q And were you happy in that position?

A In the beginning, yes; but then, no. I resigned my position there.

Q And did you ask the City to come work at the beach full time after you resigned from your other job?

A I believe I did, yes.

Q Okay. So you left your beach job each summer for three summers, and then eventually came back and wanted to work there full time.

Did you — in any of these times that you came

back to the beach, did you look for another job anywhere else, or did you always want to come back to the beach?

A I don't believe that I did look for a job anywhere else. For the most part, I enjoined [sic] my job on the beach, and, you know, after those summers, did want to come back.

Q And you did, you kept working at the beach full time until you left to go to law school in June of 1990?

A It was — I don't recall the dates. I remember is was mostly full time, you know, maybe four or fives days a week, but it wasn't classified during that time.

Q Okay. And throughout this entire period, when you leave for two or three months, David Silverman worked at the beach the entire time and Terry worked the beach that entire time; is that correct?

A That's correct.

Page 202, lines 6-25; Page 203, lines 1-2

Q Do you recall this testimony for your deposition of June 11, 1992, on Page 164, at Line 13.

"Question: Did you ever hear any discussion about body parts in the locker room, meaning references to body parts?

"Mr. Amlong: Are you talking about Mr. Silverman?

"Mr. Goldstein: Just in the locker room in general.

"Amlong: Anybody?

"Goldstein: Yes. In the locker room by lifeguards.

"The Witness: Yes. I overheard, you know, statements of that sort.

"Question: What kind of statements did you hear?

"Answer: I don't recall what they were. I know I overheard things about that, though, from males and females. Again, maybe occasionally from a female, but since it was mostly guys, it was mostly from the males."

Does that refresh your recollection as to whether you did, in fact, hear males as well as females discussing such issues as body parts in the locker room?

A Like I said, I can't really recall now. That is my deposition. You know, maybe at that time I remembered a little bit more since it was two years earlier.

Page 203, lines 13-25; Page 204, lines 1-19

Q And would you describe the atmosphere in the

locker room as where kidding and joking and teasing each other, the lifeguards, would occur occasionally?

A Yes, it would occur occasionally.

Q And would some of that kidding, teasing, and joking contain sexual overtones?

A I am not sure, like, what you are addressing by "sexual overtones." Are you talking about, like, a male guard talking to another male guard, you know, about maybe something that happened with him?

Q I think I was asking these questions at the deposition, but your answer to that question at the deposition was, "Some of it, yes."

Does that refresh your recollection as to what was meant by kidding, teasing, joking, containing sexual overtones?

A You know, again, that is my deposition. I guess I probably would remember it more than, you know, some things.

Q Do you recall now that that atmosphere existed and whether or not you found it offensive?

A I believe that, you know, that atmosphere did exist to, you know, some extent, and, yes, I did find some of it offensive.

Q All right. Do you recall how you answered that

question on your June 11, 1992, deposition in that case, Page 64, Line 2?

"Question: Did you find any of the sexual teasing, joking, or kidding that others engaged in — did you find that offensive?

"Answer: No, I didn't."

A Okay. I guess you just refreshed my recollection.

Page 205, lines 8-25; Page 206, lines 1-9

Q Did you ever tell David Silverman you were offended by his conduct?

A I don't really recall, you know, if I told him, you know, I found it offensive.

Q Did you ask him to stop?

A No, I don't believe I did.

Q How about Mr. Terry, did you ever tell him you found his behavior offensive and wanted him to stop?

A I didn't, you know, speak the words, "I find this offensive."

Q Okay. And I think you mentioned before that your captains during most of your employment were Parks and Morrison?

A That's correct.

Q Did those two men engage in any sexual banter or teasing with you?

A Not that I recall.

Q Okay. And Morrison was a captain throughout that period, and, as Captain, was he David Silverman's supervisor?

A Yes, he was.

Q And did you ever complain to him that David Silverman was engaging in language that you found offensive?

A No, I did not.

Q And how about Pat McGowan, did you ever complain to him that you found David Silverman's language offensive?

A No, I don't believe I did.

Page 212, lines 24-25; Page 213, lines 1-8

Q And, if I recall correctly, you claim that Mr. Terry touched your thigh in April of 1990?

A Yes.

Q That incident upset you?

A Yes, it did.

Q And you already knew you were leaving your job at that point?

A Yes.

Q Did you complain to anybody in management?

A No, I did not.

Cross by Burke
Page 226, lines 2-6; Page 227, lines 4-14

Q You never told Mr. Terry after pulling away, "Please, don't touch me in that fashion," or, "I find that offensive," or "I would rather you not touch me," or any words to that effect; correct?

A I don't recall making any statements of that type.

Q You have a sister Kit Faragher?

A I have a sister Kit Faragher. It is her married name.

Q All right. During the time that you worked at the City of Boca Raton, your sister applied for employment there; isn't that correct?

A Yes, I believe she did.

Q All right. You never made any attempt to stop your sister from coming to work at the City of Boca Raton; is that correct?

A No, I didn't.

DAY 3
June 23, 1994

TESTIMONY OF BEVERLY ANN BARTA

Direct by Amlong
Page 3, lines 10-12; Page 4, lines 5-25; Page 5, lines 6-25; Page 7, lines 1-9

COURT State your full name, please, and spell your last.

A Beverly Ann Barta, B-a-r-t-a.

Q And was there a time previously that you were employed by the City of Boca Raton.

A Yes. I had been employed by the City of Boca Raton off and on for a period of about five years. I worked part-time Gumbo-Limbo Nature Center for the City of Boca Raton.

And then I worked for one year at Meadows Park swimming pool for the city as a weekend lifeguard, and then three years for the City of Boca as an ocean lifeguard.

Q And when did you work as an ocean lifeguard?

A What were the dates?

Q Yes.

A I think approximately from '89 to '92.

Q And during the time that you worked at the

City of Boca Raton as an ocean lifeguard, were you familiar with Bill Terry?

A Yes.

Q And were you familiar with David Silverman?

A Yes.

Q During the time that you worked as an ocean lifeguard, did there ever come a time when Mr. Terry touched you in a manner that you felt was not appropriate?

A During my employment as an ocean lifeguard, there were two instances where Bill Terry had touched me in an inappropriate way. In both instances were after a morning meeting where we were all inside the building, inside the headquarters building.

The headquarters building was full of lifeguards getting ready to go out for their shift, and during those two instances he had grabbed me in my buttocks area.

He was kind of in a corner where other people really couldn't see what was happening, but I felt what was happening. When I turned around, out of the corner of my eye, I saw who had grabbed me, and it was indeed Bill Terry.

Q Did you do anything that you intended as an invitation for Mr. Terry to so touch you?

A No. I was simply getting ready for my shift, to

go out to my lifeguard stand.

Q During the time that you were employed by the City of Boca Raton as an ocean lifeguard, did you ever hear Mr. Silverman say anything that you felt — saying anything sexual that you felt was not appropriate.

A Yes. I think David Silverman often used vulgar language, and I have heard him ask at least one female lifeguard for a blow job.

Q Which female lifeguard was that?

A Betty Lynn [sic].

Q Was Mr. Silverman your superior when you were at the City of Boca Raton as an ocean lifeguard?

A Yes, he was a lieutenant.

Q And during that time that he was a lieutenant, did you have occasion to give to Mr. Silverman a signed but undated resignation?

A Yes, I did.

Q Would you please explain to Judge Highsmith how you came to give Mr. Silverman your signed but undated resignation?

A Well, the details are a little bit fuzzy since this was several years ago.

I recall David Silverman said he had a problem

working with me and he took the matter to Bill Terry, and Bill Terry and Dave Silverman and I had a conversation outside of the headquarters building saying that they would try to overlook the fact that I was difficult to work with if I would sign this resignation and they could submit it at any time for any reason. If I signed this, I could then keep by job for the time being.

Q Did you consider Mr. Silverman to be your supervisor?

A Yes.

Q Your boss?

A Yeah. Because he was in more of an authoritative position than I was. I was just a lifeguard and he was a lieutenant.

Cross Examination by Stutin
Page 8, lines 19-25; Page 9, lines 1, 24-25; Page 10, lines 1-25; Page 11, line 25

Q You recall two incidents where Bill Terry allegedly touched your buttocks?

A Yes.

Q Did anyone else in the beach patrol engage in similar touchings? Did anyone else touch you?

A No.

Q Did you see Bill Terry touch anyone else ever?

A No.

Q You didn't complain to anybody in City management, though?

A Not at this time, no.

Q Okay. Do you recall whether the other male and/or female lifeguards sometimes engaged in off-color language?

A Can you define off-color language?

Q Bad words, curse words.

A Yes. I would say yes.

Q Was that typical?

A It depended on the individual.

Q It wasn't confined just to David Silverman, though?

A No. But he was — I would say as a leader, I would say he kind of set the tone or the mood for the climate there.

Q He was a lieutenant when you were there?

A Yes.

Q Did you receive a handbook when you were hired by the City?

A Yes.

Q And are you aware of avenues of complaint that you would follow if you had any problems?

A No. The beach unit was physically removed from the rest of the City, and we all felt pretty isolated from the rest of the workings from the City of Boca Raton.

Q Do you recall when we took your deposition in September 14, 1993, in this case, and do your recall the following questions and answers at page 17, line 7:

"Question: Were you aware of any other avenues of complaints you could have used if you didn't want to go to your lieutenant or captain?
Answer: Yes, I was aware of that."

Does that refresh your recollection that you were aware that there were avenues of complaint you could take if you wanted to avoid talking to your lieutenant or your captain?

A Being aware of an avenue and actually, logically, pursuing it are two different things. They could fire me at any time for any reason.

Q Okay. Do you consider your job being an ocean lifeguard as being a good job?

A It was basically a good part-time position, yes.

Q Would you characterize it as a great part-time

position?

A In many ways, it was — when you were out in your tour alone in the salt air and the ocean breezes, being paid to work out.

There were many positive aspects of the job. One of the least positive aspects, however, was being in headquarters and having to deal with the personalities of David Silverman and Bill Terry.

Q Did you go to a meeting to discuss what had been going on in the beach at Nancy Ewanchew's house?

A I don't know if you would characterize it as a meeting.

Cross Examination by Burke
Page 15, lines 7-25; Page 16, lines 1-17

Q Do you recall when you went — that the first time you had any discussions with the other female lifeguards concerning anything was when — concerning harassment was when you had this meeting or get-together at Miss Ewanchew's house?

A Yes. As I recall, it was the first time where we actually shared information about the experiences.

Q Prior to that, you and the other female lifeguards had not discussed amongst yourselves any complaints that you had about

Mr. Terry that related to matters of sexual harassment; isn't that right?

A I never discussed it with anyone else, no.

Q All right. With respect to the two touching incidents that you have described, you had no discussions with Mr. Terry at the time those incidents occurred; correct?

A Correct.

Q Made no complaints about the incidents to anyone else at the City of Boca Raton at the time the incidents allegedly occurred?

A Well, since there was no way of proving that he actually touched me, I felt there was no reason to go forward and say anything.

Q Would you be good enough to answer my question?

A Would you repeat it again?

Q Sure. At the time the incidents occurred you made no mention of them to anyone else at the City of Boca Raton?

A Right.

Q To your knowledge, no one witnessed this, including Miss Ewanchew or Miss Faragher?

A To my knowledge, nobody else saw it.

Q You went out and proceeded to work that day in the tour and continued on with your normal duties?

A Right.

Q All right. Would that be true with respect to both of these incidents, the questions I just asked you?

A Yes.

Cross by Goldstein
Page 17, lines 1-14

Q You mentioned that Mr. Silverman was often vulgar. It's true, is it not, that whatever vulgarities you overhead Mr. Silverman make were directed at groups of men in the locker room?

A No, I would say that they were equal between women and men.

Q Isn't it true that he directed these — this language mostly to men?

A Well, most of the lifeguards were men.

Q And they were in groups of mostly men; is that correct?

A I never noticed him really make a differentiation between the speaking patterns men versus women.

TESTIMONY OF DAVID SILVERMAN

Direct Examination by Amlong
Page 23, lines 15-16, 18-19; Page 24, lines 1-2
Page 26, line 25; Page 27, lines 1-24

Q Tell the jurors what your name is, what you do for a living, where you live.

A My name is David Silverman. I'm the marine safety captain of the Boca Raton Beach Patrol.

Q How long have you worked for the City of Boca Raton?

A I'm in my 14th year.

AMLONG Page 2, lines 1 through 3

Q Always as a lifeguard?

A Lifeguard and an aquatics lieutenant now, an aquatics — captain.

Q Did you ever request that Beverly Barta had signed a resignation form?

A Bill Terry had offered that as a solution to her problem, and she agreed. However, I did not ever offer that.

Q What was your problem?

A She would miss the morning meetings. They are mandatory, and there was a roll call training. And I had to discipline her a few

times because by missing a meeting, the person not there, it is destructive to others, and I was trying hard to get the beach running on time and trying to get the people back from lunch on time.

And I asked her to stop missing the morning meetings and to attend it like everyone else. And she always had an excuse as to why she would be late. And I said, "I just don't know what to do."

So I think either she or I or Bill or someone requested that the three of us meet to work this out. And I did not want to fire her or discipline her any more. That was not my intent.

And we were standing out east of the headquarters, and Bill had offered that as a solution, if she causes any more problem, then she would just leave and we would date it and that would be that. She felt that that was a good idea, and she did it.

Page 29, lines 1-25; Page 30, lines 1-25; Page 31, line 1

Q Did you learn anything from the discipline that was given to you by Mr. Lasalla?

A I don't think I learned anything from the discipline. However, from this entire experience, I believe I have.

Q Did the forfeiture of 40 hours of vacation pay

make you change the way you behaved?

A No, sir.

Q Do you consider that your actions toward any of the other female lifeguards to be inappropriate?

A Please repeat that.

Q Do you feel now your actions toward the female lifeguards about which Miss Ewanchew was complaining was inappropriate?

A No, sir, I don't know.

Q Do you feel that the language that you used in your conversations with female lifeguards was inappropriate?

A No, sir.

Q Who informed you about Boca Raton's policy concerning sexual harassment?

A I don't recall ever hearing the term or being informed about a policy until Nancy wrote the letter to Mr. Bender.

Q Prior to the letter to Mr. Bender, did anyone in the government of the City of Boca Raton ever, to your knowledge, affirmatively raise the issue of sexual harassment to you?

A I told you I never heard the term.

Q Did anybody ever tell you that if you made unwelcome sexual advances to a woman co-worker or subordinate, that you would be punished for it?

A Did anyone in the City ever tell me? Is that what you are asking

Q Yes.

A No, sir.

Q Did anyone ever tell you that if you used language that would make a reasonable woman feel uncomfortable on the job, such as the word cunt, that you would be punished for it?

A Did anyone ever tell me that?

Q Yes.

A No, sir.

Q When did you become a lieutenant?

A July of 1985.

Q When you became a lieutenant in the City of Boca Raton — I'm sorry. When you became a lieutenant, did anyone in the City of Boca Raton ever tell you how as a supervisor you should react to a situation in which one of your subordinates, one of your male subordinates, made inappropriate advances to one of your female subordinates?

A I don't recall anyone ever telling me that.

DEPOSITION TESTIMONY OF WILLIAM WIDD TERRY

Direct Examination by Amlong
Page 32, lines 12-19; Page 33, lines 11-16; Page 34, lines 12-25

Q What's your full name, where do you live, and what do you do for a living?

A My full name is William Widd Terry, the III. I live in Boca Raton, and I work for the City of Boca Raton.

Q How long have you worked there?

A Twenty-three years and a few days. Wait a minute. What's today? Twenty-three years tomorrow.

Q During the twenty-three years that you have worked with the City of Boca Raton, please tell me the first time that you recall that any of your bosses ever communicated to you either orally or in writing about sexual harassment?

A I can't recall anything up until the point where the letter from Nancy in. And the subsequent investigation.

Q Mr. Terry, I am showing you what's been marked as Plaintiffs' Exhibit 1 and what was identified as Plaintiffs' Exhibit 3 yesterday to Mr. Bender's deposition, during which time he

said this is the cover sheet he had used to send around a December 26, 1986, sexual harassment policy. It was supposed to be distributed to all employees.

Did you ever receive either the personnel memorandum 86, which is the cover sheet, or the attached sexual harassment policy statement that you recall?

A Did I ever receive it, is what you are asking me?

Q No. Did you prior to the City's getting the letter from Nancy Ewanchew, have you ever had this.

AMLONG And then he examines the document.

A I really don't know.

Page 35, lines 23-25; Pages 36-40, lines 1-25

Q Tell me what your job duties were as marine safety chief?

First of all, tell me when you first became marine safety chief?

A Mid-'70's. I don't know when exactly. The basic day-to-day operations of the beach, preparing budgets, making recommendations — well, requesting testing dates and making recommendations for hiring, keeping the line of communications opened between downtown and the beach, staff meetings,

participating in the evaluation process.

Q You said that you made recommendations that people be hired?

A Yes.

BURKE Page 13, line 23:

Q Who made the decision as to whether or not someone would be hired?

A That works through the chain of command with the City, and I would made my recommendations to the Parks and Recreation Office, and they in turn would send it on to personnel. And barring no problems on their part, that's the way it worked.

Q Can you recall any recommendation to hire someone that you made that was not acted favorably upon?

A In twenty-years, we hired a lot of people, and in life saving, there is quite a turnover, and I believe there was times where our staff would do the interviews, and perhaps I would be included in that if I was on duty or whatnot.

And we do some job reference checking, and we would send it through under my signature, of course, and either Parks or Recreation or Personnel would find a reason that we did not hire that individual.

Q Can you recall any specific?

A Oh, it seems to me that there were a number.

Q Can anybody be hired with out your recommendations?

A I don't know. I guess likely not. But if I had been off and there was some kind of a need to test and —

Q Was anybody, to your knowledge, ever hired as an ocean lifeguard against your recommendations?

AMLONG Mr. Burke interjects, "While he was marine safety chief?" And I say "Right."

A A simple answer would be no. We got to working on a team work-type of basis, and sometimes through the interviews, if two out of three of us involved, or three out of four of us involved were high on somebody and the other person wasn't, well, majority ruled.

Q But would that carry your recommendations?

A I might be the dissenting vote, but it would still carry my recommendations because that's what the team decided.

Q So, no one ever got hired without the hiring recommendation being signed by you if you were on duty when it was going on?

A That's a fair assumption.

Q How about firing? Who fired people?

A That's a matter that goes to Personnel and the City Manager. They make that determination.

Q Who initiates firing people?

A Staff at the beach or myself, or inclusive.

Q Is there a recommendation for firing that goes in to Personnel?

A Sometimes it was in the form of a letter. Sometimes it was the problem may have been brought to my attention and then discussions were held between myself or other staff at the beach with Recreation people. They made the decision.

Q Did you have the authority to initiate a termination?

A Yes.

Q Did you have the authority to recommend suspension?

A Yes.

BURKE Continuing on Page 21, lines 10 through 18

Q Did anyone below your level have the authority to formally recommend suspension?

A Basically, like I indicated before with terminations, if I was off, one of the supervisors had a problem with somebody, policy was violated, they would bring it to my

attention on my return to work, or even to my boss' attention if I was off and it was a day that the person was on, and the decision would be at that level.

Q Did you participate in the evaluation process?

A Yes, I did.

Q Did you have to approve the final evaluation of each person who was an ocean lifeguard?

A Yeah.

Q When you evaluate somebody and they scored however many points they scored in the evaluation, did that equate to a specific percentage of salary increase?

A That was pointed out yesterday, yes.

Q What discussions did you have with your subordinates concerning sexual harassment?

AMLONG Mr. Burke interjects, "Prior to Miss Ewanchew's letters?" and I say "Yes".

A I don't think we had any.

Q What discussions did you have with any of your superiors about sexual harassment prior to Mr. Ewanchew's letters.

A I don't think any.

Q Prior to Miss Ewanchew's letter, did anybody

at the City of Boca Raton affirmatively raise to you the sexual harassment?

A Can you change those words to something that is a little bit more —

Q Did anybody every come and say to the effect of we need to discuss what the City's sexual harassment policy is?

A No.

Q Did anybody prior to Miss Ewanchew's letter ever express to you the City of Boca Raton's strong disapproval of sexual harassment?

A No.

Q Did anybody indicate, prior to Miss Ewanchew's letter, that if you engage in sexual harassment, that you could be punished for it?

A No.

Q Did anybody in the City of Boca Raton, prior to Miss Ewanchew's letter ever tell you as a supervisor — did anybody in the City of Boca Raton, prior to Miss Ewanchew's letter, ever tell you how you, as a supervisor, should deal with complaints about sexual harassment?

A No.

Q Did anybody in the City of Boca Raton, prior to Miss Ewanchew's letter, ever do anything whatsoever to sensitize you to the issue of

sexual harassment?

A I think I already answered that. The answer is no.

Page 44, lines 21-25; Page 45, lines 1- 12

Q Who does the interviewing for lifeguard lieutenant?

A Lifeguard lieutenant?

Q When you were marine safety chief?

A In other words, your asking the interviews for lieutenant position?

Q Yes.

A Staff and house.

Q What's that mean, you or —

A Me, captains.

Q Who made the final recommendations?

A I would sign the ultimate letter with that recommendation, but it would come from a team-type discussion in a democratic way, the majority rules.

Q How about for captains, how are the captains chosen?

A Well, basically, the same way. I mean, I could

go through the whole thing again, but it's got to be through advertising, in-house or out.

DEPOSITION TESTIMONY OF RICHARD BENDER

Direct Examination-Amlong
Page 48, lines 13-25; Page 49, lines 1-13, 21-25
Page 50-53, lines 1-25; Page 54, lines 1- 6

AMLONG Your Honor, these are excerpts from the deposition of Richard Bender that was taken at my office in Ft. Lauderdale December 28, 1993.

Q What's your job at the City of Boca Raton?

A Director of personnel and labor relations.

Q How long have you been doing that job?

A Since February of 1986. Prior to that, from November of '77 to approximately May of '81.

Q And continuously from February 1986 forward?

A Yes.

Q As a personnel professional who since at least 1977 has had responsibility for Equal Employment Opportunity clients, are you familiar with the Equal Employment Opportunity Commission's guidelines and discrimination because of sex?

A I would not consider myself an expert, and I don't recall a specific provision.

Q Have you ever read the regulations issued by the Equal Employment Opportunity Commission?

A I'm sure that I have in the past, yes.

Q Prior to 1991, what steps, if any, to your knowledge, did the City of Boca Raton take to affirmatively raise the subject of sexual harassment with its employees?

A The first step that I'm aware of would have been in 1986 when, I believe it was in February of '86. It was — there was a memorandum policy issued by the city manager Rutterford to all employees.

Q How is that document distributed?

A You know, I don't know precisely. I could tell you what our routine is. Our routine is that we issue documents like this to department directors, expecting that they will post them on bulletin boards and they will also give copies to the timekeeper for distribution in paychecks.

Q Other than the issuance of the sexual harassment policy on February 26, 1986, what else, if anything, did the City of Boca Raton do between 1986 and 1991 to affirmatively raise with its employees the subject of sexual harassment?

A I don't recall exactly when it was. There did come a time when we requested of Mr. Hurtgen and one of his associates to come up and address the city department heads to issue training and deal with other civil rights issues.

Q Now, within the parks and recreation department, how well would they have gone down? I mean, would he have met with Mr. Terry that day?

A No, it would have been Mr. Alexander.

Q The parks and recreation director?

A Right.

Q What, if anything, did the department directors do following that meeting, to your knowledge?

A I don't know.

Q Was there any plan that they disseminated where they had learned their subordinates?

A I don't know what they — I don't know what plans they had.

Q Did you put this together as part of your job function?

A I requested Mr. Hurtgen to come and put on the presentation to the department heads, yes.

Q When you requested that, did you have a plan

that this was to somehow trickle down to the division directors?

A I didn't have plans for the department heads to conduct trainings themselves, no.

Q Okay. So, other than the issuance of the February 26, 1986, sexual harassment policy, and Mr. Hurtgen and his associates to come up and discuss it, what, if anything, did the City of Boca Raton do between 1986 and 1991 to affirmatively raise the issue of sexual harassment with its employees?

A Again, I don't recall the time, but there was an occasion when Mr. Hurtgen put on the sexual harassment training program from our police department.

Q Anything else?

A Not specifically that I can recall.

Q Why did you choose the police department to have a special sexual harassment training program.

A I didn't. The police chief requested it.

Q Other than the issuance of the February 26 policy statement prior to 1991 — I'm sorry, prior to the 1990, what, if anything, did the City of Boca Raton do to express its strong disapproval of sexual harassment?

A Its strong disapproval of sexual harassment

was again in a 1986 policy issuance by the city manager.

Q I am saying after that; in addition to that?

A Oh, in addition to that?

Q Yes.

A I don't know anything in the way of any official program. We are constantly, through my office, are in contact with supervisors and with employees, and we constantly try to urge employees who have problems to work through the chain of command and get their problems addressed.

We also constantly encourage supervisors to be open and available to employees who have problems, try to quell them.

As I said earlier, it is not in the interest of the City of Boca Raton to have problems fester out there. We want to be informed by employees, and we want supervisors and, if necessary, my staff to respond to them promptly.

Q That refers to in general.

I am asking you, did you do anything specifically as regards to sexual harassment to express strong disapproval of that by the City's management and its personnel and labor relations departments?

A Nothing other than what I have already

indicated.

Q What, if anything, did the City of Boca Raton do prior to 1991 to develop appropriate sanctions for sexual harassment?

A I don't think we would view sexual harassment as having appropriate sanctions. We would review sexual harassment as any other misbehavior. We would evaluate the specifics of the situation and respond to it as to what we thought appropriate.

Q Now, prior to Miss Ewanchew's complaint, what, if anything, did the City of Boca Raton do other than to issue the February 26, 1986, sexual harassment policy to inform employees of their right to raise and how to raise the issue of harassment under Title VII?

A On that specific issue, nothing, but employees of the City of Boca Raton have been, as you said earlier, repeatedly had available to them, the opportunity to talk to supervisors through an informal process. There were grievance procedures set forth under the personnel rules open to them. There were other grievance procedures opened to them under the various collective bargaining agreements providing they were a member of the collective bargain agreement.

Q But the City did nothing specifically to address the problem under Title VII.

A No.

Q Nothing specifically?

A No. We didn't do anything specifically for sexual harassment. We certainly would have intended those procedures be open to employees to pursue sexual harassment claims, or any other claims of ill treatment.

Q Prior to 1991, what, if anything, did the City of Boca Raton do to desensitize all concerned concerning sexual harassment?

A Essentially nothing, other than I recounted already.

Page 55, lines 1-23; Page 57, lines 16-25; Page 58, lines 1-10

Q During the time that Miss Ewanchew and Miss Faragher were employed as lifeguards by the City of Boca Raton, did you consider that their superiors on the beach, the other lieutenants or other lifeguards, had an affirmative duty to report to your office what they, any improper behavior they think <HOFRBGDZ> that could be construed as sexual harassment?

A Well, either report to me or report it to someone within the department's chain of command structure, yes.

Q And during your investigation of Miss Ewanchew's complaints, you satisfied yourself there had been inappropriate behavior occurring on the beach; correct?

A Yes.

Q Is a lifeguard captain considered to be a supervisory personnel?

A Yes.

Q Do supervisors have a responsibility to report to you sexual harassment that they observe in subordinates or in fellow supervisors?

A Well, again, if a supervisor observes some behavior of any type, be it sexual harassment or anything else that is inappropriate to the workplace, then, yes, I would say it's incumbent on that supervisor to report it to either me or someone else within the chain of command of the department or someone else in the City with the position of authority.

Q There is a captain named Flash Gordon; correct?

A Yes, there was.

Q And Mr. Gordon was aware of sexual harassment on the beach; correct?

A I don't know that he was.

Q Did Mr. Gordon ever inform you that he was aware of sexual harassment?

A No, he didn't.

Page 64, lines 22-25; Page 65, lines 1-9

Q Tell me what Bill Terry's job was as marine safety chief?

A What his job was?

Q Yes.

A He was to supervise the ocean lifeguard operation of City of Boca Raton.

Q Did Mr. Terry have the authority to hire and fire people?

A No.

Q What did he have the authority to do?

A Make recommendations.

Q For both hiring and firing?

A Yes.

COURT'S ORAL RULING ON DIRECTED VERDICT

Page 108, line 2 through Page 111, Line 2:

THE COURT: Well, let me note that counsel made some very interesting, and as I indicated before we left, intriguing arguments in support of their respective motions, and I can advise you that I have taken those quite seriously. I think we should. There's a tendency to approach questions at this stage in a trial, or motions at this stage in a trial, with something of a cavalier attitude. We have not done that.

I will tell you at the outset what my rulings are, but I want to also advise you of at least one matter that gives me considerable concern; and in an abundance of caution, I am postponing an ultimate decision on that particular issue until the conclusion of this case.

But, first of all, I will deny the City's motion with regard to retention, the retention issue. I have heretofore denied the other motions.

But with regard to the City of Boca Raton, let me advise you, respectfully, Mr. Amlong, I have considerable concern about the matter of notice, that elusive term called pervasive.

I have not yet, of course, heard all of the evidence nor assessed all the evidence, but it appears to me that there is an interesting parallel. And perhaps at this point, or in my ultimate decision, I may decide that it is an improper parallel, but at least an interesting parallel was raised by virtue of the testimony of the witness Barta.

And while I will assess the credibility of all of the witnesses at the appropriate time, I recall in reviewing some of the case law with my clerk that I observed her, and will make the finding at the appropriate time that the witness Barta was the most credible witness that I have assessed, not only in this case, but in my tenure on this particular bench. I was impressed with her candor, her responsiveness, her directness to the questions, her lack of evasiveness.

But out of that arose the question, well, if she was not aware of what one might compare to reputation, or a situation of such proportion that we must find it to be pervasive, then how could we expect the City to be aware?

And in that regard, at least for the purpose of this motion, I have made a determination that neither Terry nor Silverman, and I use their names, last names, respectfully, as parties rather than designate them by their full names, but neither of those individuals, neither of those defendants were in a position, it appears to the Court, sufficient or of such standing, the law of the case on the subject to be considered for all practical purposes high enough echelon to be the City itself from the standpoint of knowledge, much as we impute the knowledge of a president or board of directors or executive director of a corporation to the corporation itself.

But, then, on the other hand, and I address this to the City, I am reminded of the fact in reviewing my notes that Miss Barta was not a full-time employee. So, maybe, that's the reason she wouldn't know it.

On the other hand, the City is there all the time. And then we face the problem of equating the knowledge that we have about the uniqueness, if you will, of the lifeguard unit. While there has been little testimony on it, all that there has been has been consistent with only one conclusion, and that is not necessarily a stepchild, but certainly a part or segment of the City that's not quite as aligned with the overall activity of the City, or as I think was referred to by the witness I have already alluded to, far enough away from the City Hall not to really be so close that you would run in and talk to somebody about what was going on, that you were sort of segregated, using that term loosely.

A lot of things to think about. I want you to think about it because either I will allow you to argue it, or if I don't have time, I will allow you to make further written submission at least on that subject.

That having been said, the motions of the respective individual defendants are denied, denied in their entirety.

DEPOSITION TESTIMONY OF GAIL NYE

Page 116, lines 9-12

Q Okay. How about Bill Terry? Did he engage in any kind of similar behavior?

A I don't remember him using any specific vulgarity verbally.

Page 126, lines 20-25; Page 127, lines 1-25; Page 128, Line 25

Q Did anyone from the City of Boca Raton make any attempt to educate you about the City's policy concerning sexual harassment?

A No.

Q Did anyone from the City of Boca Raton make any effort to educate you about the laws governing retaliation for complaints about sexual harassment?

A No.

Q Were you afraid to complain to anybody at city hall about Mr. Silverman?

A Yeah.

Q Were you afraid to complain to anybody at city hall about Mr. Terry?

A Yes.

Q Why were you afraid?

A Because I thought I would lose my job because I am part-time. I was part-time.

Q Did you ever complain to Flash Gordon — what is Mr. Gordon's first name?

A Flash. Oh, well, Robert Flash, though.

Q Okay. And he was a training officer or —

A Yes.

Q — a captain? He was somehow superior to you?

A Yes.

Q And did you ever complain to him about what Mr. Silverman said concerning your "clit"?

A Not officially like at work. But probably off the job, yeah.

Q Did you bring it to his attention at some point?

A Yes.

Q Did you ever bring the cunt remark to Mr. Gordon's attention?

A Yeah, I did.

BURKE Page 87, line 22

Q Did you ever mention any of the incidents to Mr. Gordon concerning Mr. Terry's putting his arm around you.

A I don't remember if those, specifically, I did not, to tell you the truth.

Q Do you know who was responsible for your being terminated from the City of Boca Raton as a lifeguard?

HURTGEN Go to page 94, please, line 6.

Q Okay. Did you consider the context of these clubs to be exploitive of women at all?

A I used to think that —

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A I used to think that at first. As a matter of fact, when I went to get hired at Solid Gold, believe it or not, when I answered the ad in the paper, I didn't know it was a strip bar. I didn't know it was strip bar until we had our first few meetings. That was before the club ever opened.

So call me naive, but until a few nights before — when the dancers showed up, then I realized what was going on and I threatened to quit. As a matter of fact, I did quit. After a few nights, I thought that may not be the thing for me and I quit.

Page 129, lines 14-25

Q Okay. When Mr. Amlong was asking you a few questions about discussing certain instances with Flash — you said. Yes, you had told him about it — I can't recall which two things, but maybe you can refresh my memory.

A Well, the thing with Silverman in the tower, and the times when he would say stuff about Rob and myself. But I said it probably too much in passing. It wasn't really a complaint. It was more like a comment, I suppose.

Q Because earlier when we talked about it, you said you think you might have mentioned it in the context of a group situation, more of a social than a work situation?

A Yeah.

TESTIMONY OF SANDRA DIOLI KUMM

Direct by Stutin
Page 136, lines 10-22; Page 138, lines 22-25; Page 139, lines 1-14; Page 140, lines 6-16

Q Were you employed by the City of Boca Raton?

A Yes, I was.

Q And in what capacity were you employed?

A I was the recreations superintendent.

Q And who did you report to as recreations

superintendent?

A Tom Alexander, the director.

Q Do you recall what dates you were employed in that capacity?

A March of '88 to May of '89.

Q And as recreation superintendent, did you directly supervise Bill Terry?

A Yes, I did.

Q Okay. While you were down at the beach on those occasions, did you also have occasionally the opportunity to observe the guards interact with one another?

A Yes, I did.

Q Specifically, did you see their interactions in the locker room?

A Yes, I did.

Q And how would you describe them?

A Sophomoric, bantering, playing around, snapping of towels, talking about girlfriends, boyfriends, rather than keeping the work mode in mind.

Q All right. And did you see both male and female guards engage in that kind of —

A Yes, I did.

Q Did anyone seem offended by that environment?

A No. It seemed like the normal course of action.

Q Did they seem like they were having a good time?

A Yes.

Q Were you ever approached by any of the guards to complain that the environment was sexually offensive to them?

A No.

Q Did you hear any complaints specifically about Bill Terry touching the buttocks or breasts of any female lifeguard?

A No, I did not.

Q Anyone come to you to complain about David Silverman's language?

A No.

TESTIMONY OF LORRAINE GARDNER

Direct by Hurtgen
Page 154, lines 8-25; Page 158, lines 1-14

Q When did you become the superintendent of recreation?

A In 1974.

Q What was the job? What did it entail, what were your responsibilities?

A Well, my responsibilities were to oversee all of the City's recreational facilities.

Q And what were those?

A Well, we had the beach, tennis courts, shuffleboard courts, swimming pool, and the community centers.

Q Okay. Let me direct your attention to the beach activities.

What did we call or what is that entity known as?

A Well, back in '74, it was only South Beach and Spanish River Park. Since then, Red Reef Park had been added to it. So there were really three separate beaches.

Q And how many employees were employed at those three beaches, total?

A Depending upon the time of the year, there could have been anywhere between 30 or 40.

Q Thirty to 40?

A Full or part-time.

Q Would that be both full and part-time?

A Yes.

Q And what were the positions of employees at that time?

A Well, there was the regular ocean lifeguard, and then there was the lieutenant, the captain and the chief.

Q Okay. Who as the marine safety chief?

A Bill Terry was the chief.

Q All right. And you held this recreation superintendent job from 1974 until January of 1988, is that right?

A Mm-hmm.

Q Was Mr. Terry the chief throughout all that time?

A Yes, he was.

Q To whom did he report directly?

A He reported directly to me.

Q Okay. How much contact did you have with him?

A I saw or talked to Bill daily.

Q All right. Where — if you saw him, where would you see him?

A Most of the time, it was in my office. Occasionally, I would see him at beach headquarters.

Q Okay. How often did you go to beach headquarters?

A Again, depending upon the time of year and what other job responsibilities I had, I would say on an average of maybe every other month.

Q Okay. Did you go to the beach areas other than beach headquarters?

A Oh, yeah. I traveled the A-1-A, the strip on A-1-A, just to observe the lifeguards and make sure all the towers were covered, and just to see what was going on in the beach, not necessarily getting out of the car.

Q Did you at times get out?

A Oh, yes. I got out.

Q How often did you make these trips to the beach itself?

A Oh, I would say two or three times a week.

Q Okay. The employees that you have described, the lifeguards, the lifeguard lieutenants, were they covered by a union contract?

A They were — let's see. The lifeguards were covered. I believe the lieutenants were covered. I don't think the captain and the chief were covered.

Q When you were at beach headquarters at any time, do you recall hearing Mr. Terry use off-color or language that was derogatory toward women in any way?

A No, I didn't.

Q Did anybody ever tell you that there was raw and/or sexually offending language about or directed to women at the beach?

A No.

Q Did you have any role in the disciplinary scheme for the lifeguards and the lieutenants at the beach?

A Only if they were given three reprimands by their supervisors. Then they would be brought to my office for a counseling session.

Q And did that happen quite a bit?

A No. I wouldn't say any more so than any other portion of my responsibilities.

Q Okay. But if I understand, I don't remember

testimony, if the lifeguard got three disciplinary notices, the next step was to come and talk to you?

A That's basically it.

Q When you were at the beach headquarters or when you were patrolling or visiting the beaches themselves, did you ever see any lifeguard or lieutenant or Mr. Terry engaging in a touching of any other lifeguard that might be offensive?

A No, sir, I did not.

Q Did anybody ever tell you that some of that went on?

A No.

Q Did you ever have complaints about Mr. Terry of any kind?

A No. Well, just the same types of complaints that would come from any employee about their supervisor.

Q Could you give me some examples?

A I think probably the biggest complaint that I got was that he tended to show favoritism.

Q All right. Did he tend to show that in respect specifically to men or women?

A No.

Q How did you learn or how was it ever presented to you that he tended to show favoritism?

A Usually in the counseling sessions when the guards were brought to my office.

Q Okay. And they would complain about Bill Terry?

A Yeah.

Q All right.

Cross Examination by Amlong
Page 159, line 25; Page 160, lines 1-24

Q When you were supervisor — when you were the recreation supervisor what, if anything, did you do to make sure that the people under you were not engaging in any sex discrimination or sexual harassment?

A In 1962? No.

Q No, when you became recreation superintendent in 1974, right?

A '74; correct.

Q And you kept that job for the next 14 years.

A Mm-hmm.

Q During those 14 years, tell Judge Highsmith what you did to make sure that people who

worked for you did not engage in any sexual discrimination or sexual harassment?

A I didn't feel I had to do anything, actually. I believe there was a memorandum or something sent down by the city manager that outlined, if I recall correctly, outlined specifics as far as sexual harassment, as far as the City was concerned. And that letter was given to every employee with their paycheck.

But I personally didn't feel I had to do anything unless it was brought to my attention, and you have to remember that most of my staff were men.

Q All of your direct reports, all of the people that reported directly to you were men?

A All except one.

TESTIMONY OF RICHARD MORRISON

Direct by Hurtgen
Page 162, Lines 11 through 17:

Q Could you tell us where you are currently employed, please?

A City of Boca Raton, marine safety.

Q What is your position there?

A I'm a marine safety captain.

Q How long have you held that position?

A Ten years.

Page 164, lines 2-24; Page 167, lines 24-25; Page 168, lines 1-9

Q You were at the beach for a long time, but from around 1985 to 1990, can you just describe generally what the beach environment was like, the inner action amongst the guards?

A I would say it was a typical locker room for a beach patrol. There was inner action between all the lifeguards. I would say it is on a friendly basis, if that's what you were getting at.

Q People were friendly?

A Yes.

Q There was some joking going on?

A Yes.

Q Were the joking or kidding of a sexual nature?

A Probably, yes, I would say it was.

Q Okay. Was there any off-color language that you would hear?

A Yes.

Q And did this conduct, this environment, was it participated in by both the male and female

lifeguards?

A Yes, I would say so.

Q In particular, do you recall whether Nancy Ewanchew was one of the participants in that friendly, kidding joking exchange?

A Yes, I would say she was.

Q Are you aware that Nancy Ewanchew resigned as an ocean lifeguard about April of 1989?

A Yes, I am.

Q Did you have occasion to observe her come back at that point and ask for her job back at beach patrol?

A Shortly after she resigned at Boca Beach patrol, she was working for the County and wanted to know if we needed part-time lifeguards. She was looking for part-time work.

Q So she wanted her job back part-time for the City of Boca Raton?

A That's right.

Page 170, lines 11-24

Q And in the twenty years that you have been working with Mr. Terry, have you ever observed him touching a female guard in the breasts or buttocks?

A No, haven't.

Q On the thighs?

A No.

Q Have you ever heard Mr. Terry use vulgar language around the female lifeguards, or directed at them?

A No, I haven't.

Q How about Mr. Silverman, have you heard foul —

A No, sir, nothing.

Q Did you ever hear Mr. Silverman invite a female lifeguard to have sex in the back of his truck?

A No, I haven't.

TESTIMONY OF RICHARD BENDER

Direct by Hurtgen
Page 186, lines 18-25

Q What is your position with the City?

A I am the director of personnel and labor relations.

Q How long have you held that job?

A I have held the position on two separate

occasions, once from November 1977 to, I believe, May of 1981. I had then left the City. I returned to the City in February of 1986, and I have been there up to the present time.

Page 190, lines 20-25; Page 191, lines 1-15; Page 192, lines 1-25; Page 193, lines 1-2, 8-25; Page 194, lines 1-6, 11-23; Page 195, lines 15-23; Page 196, lines 2-3, 9-25; Page 197, lines 1-9, 15-25; Page 198, lines 1-25

Q All right. Was there a collective bargaining agreement in effect at all times relevant concerning the lifeguards and the lieutenants in the marine safety section?

A Yes. The ocean lifeguards and the lifeguard lieutenants are members of the union represented by the International Brotherhood and Oilers, Local 1227, and had been sufficiently, I would say, since 1974.

Q Since 1974, who have been the principal business agents for that bargaining unit?

A The president of Local 1227 is a woman by the name of Dawn Donard, D-o-n-a-r-d, and she is assisted by another woman by the name of Wanda Stimson. Miss Stimson is a business agent.

Q All right. Does your position as personnel director include meeting with union representatives concerning grievances?

A Yes, it does.

Q Have you ever met with Miss Bonard or Wanda Stimson concerning any grievances arising out of the marine safety section?

A Yes, I have.

Q Have grievances filed by the union on behalf of lifeguards ever gone so far as all the way to arbitration?

A Yes, they have.

Q On more than one occasion?

A Yes, they have.

Q Have you ever had a complaint brought to your attention — strike that.

I'll ask it. Have you ever had a complaint brought to your attention from a union representative concerning demeaning or derogatory language or treatment of lifeguards by anybody in supervision?

A No, I have not.

Q All right. Prior to Miss Ewanchew's letter to you in April of 1990, had there ever been any complaint brought to your attention of any conduct, verbal or otherwise, by anybody in the beach patrol or the marine safety section that might be considered offensive on a sexual basis?

A The only occasion that I can recall in that

parameter would be an incident, I believe it occurred in the spring of 1986, shortly after I returned.

It involved a lifeguard lieutenant by the name of John Calhoun, who I had learned at a morning meeting had lowered his bathing trunks and mooned his fellow lifeguards.

Q How did you learn of it?

A I am not a hundred percent sure.

Q You may continue your answer, sir.

A I believe I was first made aware of it by Mr. Alexander, the department director. And I asked him in turn who had made him aware of it, and he indicated it was Captain McGowan.

I further inquired as to whether or not there were any female lifeguards present at the meeting, and he indicated that there was a woman by the name of Carol LaRue, as I recall. I asked Mr. Alexander if he would arrange a meeting in his office to be attended by myself and Captain McGowan and Miss LaRue, and he did so.

And we met, and that gave me an opportunity to inquire of both Captain McGowan and Miss LaRue as to exactly what had taken place. And I subsequently had a conversation as well with Miss Lorraine Gardner who had already learned of the incident.

And I recall I had a conversation with Lieutenant Calhoun about the matter and indicated her displeasure about the incident to him.

Q I am going to show you what's been marked for identification as Defendants' Exhibit CC. Mr. Bender. Can you tell us what it is?

A Yes. This was a write-up prepared by Captain McGowan at my request detailing his observations of that morning.

Q As a result of the incident reflected in your testimony and the Exhibit CC, was there any discipline issued to Lieutenant Calhoun?

A Yes, sir. Lieutenant Calhoun was issued a letter of reprimand by the City Manager.

Q I am showing you what's marked for identification as Defendants' Exhibit BB. Can you tell us what it is?

A This is the letter of reprimand that I just referred to.

Q All right. It was considered conduct unbecoming an employee of the City to do what Lieutenant Calhoun did, wasn't it?

A Yes, sir, it clearly was.

Q I am showing you what's been marked for identification as Defendants' Exhibit EE. Can you identify that for us, please?

A Yes. This is again a notation that I had requested from lifeguard Carol LaRue to me to detail her observations of the morning in which Lieutenant Calhoun mooned his fellow lifeguards.

Q Well, it was ocean lifeguard Carol LaRue who had complained about this activity on Calhoun's part, isn't it?

A Not only Miss LaRue complained, but also Captain McGowan.

Q Did any retaliation ever become visited, to your knowledge, on Miss LaRue for complaining about Lieutenant Calhoun's mooning?

A No, sir.

Q In all the time you have been personnel director for the City, in both the original period and as in the current one, has there ever, to your knowledge, been a complaint by any employee in any department that they had been retaliated against for grieving, complaining or bringing some action forward concerning their supervisor?

A No, absolutely not. We work very hard to try to encourage an open door for all of our employees. Our employee handbook states that very clear.

We encourage our supervisors to articulate that principle very clearly, and we always have.

I have never encountered any reticence on the part of any of staff to speak with either myself or my staff about any problem, either through their unions or through their own initiatives.

Q I am showing you what's marked for identification as Defendants' Exhibit DD. Can you identify that for us, please?

A Yes, I can. This is a write-up furnished to me by Lorraine Gardner. It details a conversation she had with Lieutenant Calhoun concerning the incident for which he was subsequently disciplined.

Q Now, sir, when did you commence your second, again, period of employment with the City?

A I believe the date was February 3, 1986.

Q All right. Did you take any action shortly thereafter in respect of a sex harassment policy for the City of Boca Raton?

A I did. It was an outgrowth of a refamiliarization of myself with the City's policies and procedures. I was going through the policy and procedure manual the City had in place at the time, so both get myself up to date of what was in effect, and also to see what needed to be amended or improved upon or added to.

And in going through the process, I noted that the City had made no specific statement with

regard to the issue of sexual harassment, and I thought it best that we do so. And, accordingly, my staff and I prepared a memorandum on that subject and asked the City Manager to sign it, and it was subsequently distributed to the departments for posting and issued with paychecks to City employees.

Q Is that what has been received in evidence, Mr. Bender, as Plaintiffs' Exhibit 5-A?

A Yes, it is.

Q Did there come a time when you updated the policy set forth in Exhibit 5-A?

A Yes, we did. Periodically, we do review the manual, for obvious reasons. It is important to keep the thing up to date and timely, otherwise it loses its usefulness.

I believe it was around the spring or late winter of 1990 that we commenced that exercise, and one of the policies we chose to update and expand was the policy we had written in 1986 on sexual harassment.

Q Is the updated policy you have just described that which has been received in evidence as Plaintiff' Exhibit 5-B?

A Yes, it is.

Q Now, it bears the date of what, sir?

A It bears a revision date of May 7, 1990.

Q And when did you receive Miss Ewanchew's letter complaining to you of certain conduct amongst the beach patrol supervisors?

A I am not a hundred percent sure. It was either May 2nd or April 30th.

Q All right. Is that policy update which you have as Plaintiffs' Exhibit 5-B a result of Miss Ewanchew's letter?

A Oh, no, it isn't.

Q Well, when was that which is dated May 7th there, when was it actually prepared?

A Well, we probably started making our initial drafts a couple months in advance of that. In fact, I particularly recall reviewing a couple of those drafts with our attorney who happens to be you yourself, Peter Hurtgen, prior to its ultimate finalization and issuance.

Q How long prior to its issuance of May 7, 1990, did it commence its drafting life?

A As I say, probably a couple of months.

Q Now, there did come a time, as you have just stated, that you received a letter from Miss Ewanchew in April of 1990, is that right? That is dated April 1990?

A That's right.

Q I asked you and you just answered, I think, that you received it, I think, May 2, 1990?

A It was either April 30th or May 2nd. I'm not a hundred percent clear on that.

Q All right. I am going to show you what has already been admitted, Mr. Bender, in evidence in this case as Defendants' Exhibit L.

Is that the letter you sent to Miss Ewanchew acknowledging her letter?

A Yes, it is.

Q And you invited her to meet with you; is that right?

A That's correct, I did.

Q When was it after you sent that letter — well, strike that.

What occurred after you sent that letter next, as best you recall.

A We sent the letter to Miss Ewanchew certified. Several days elapsed, as I recall, before I got a call from her, and she indicated at the time that she had been busy and not been able to get over to the post office to retrieve the letter.

So we discussed a convenient date which we could get together on, and as I recall, it was May 17th. That worked out. She asked me during the conversation if I was going to have

anyone else present at the meeting. I indicated that I would probably have Mr. Buddy Parks, who was then recreation superintendent.

Page 7, lines 17- 25

Q Now, at the time you spoke with Miss Faragher, she was not a complainant with regard to a charge with the EEOC, was she?

A No.

Q And she didn't come forward to talk with you, you asked that she come speak with you; is that correct?

A Yes.

Q And you then spoke with her?

A Yes.

DAY 4
June 24, 1994

TESTIMONY OF RICHARD BENDER

Cross by Amlong
Page 30, lines 1-2, 13-14, 22-25; Page 31, lines 1-16, 24; Page 32, lines 1-7, 10-14

Q Other than — what, if anything, did you do to prevent sexual harassment in the City of Boca Raton?

A There was no official action other than maintaining our normal vigilance over the work force.

Q Other than the mooning incident, have you ever heard, prior to Miss Ewanchew's complaint, of any complaint of sexual harassment within the City of Boca Raton?

A Prior to Miss Ewanchew's complaint?

Q Yes.

A I don't recall. It is somewhat problematic because the term "sexual harassment" wasn't as commonly used back in that period as it is today.

Q Mr. Bender, let me break it down to everyday words and not the buzz words.

Did you ever hear a complaint from any woman employee of the City of Boca Raton that her boss talked dirty to her?

COURT I will require that be put within certain time parameters.

Q From 1986 until you got Miss Ewanchew's complaint?

A Not that I recall.

Q Did you ever hear a complaint from any woman employee of the City of Boca Raton that her boss groped her?

A I don't believe so.

Q And you had several revisions of the personnel handbook during your tenure as personal and labor relations director; is that correct?

A Yes.

Q And not until after Miss Oakland's complaint, did you ever put sexual harassment into the personnel handbook, did you?

A No. We did not address sexual harassment in the handbook, per se. Again, I think — I believed our generalized statement to invite employees to bring forward any problems they had in the workplace to use was sufficient. We relied on that.

DEPOSITION TESTIMONY OF KELLY EVANS

Page 36, lines 7-13; Page 40, lines 22-25; Page 41, lines 1-12

Q Let me just start with your employment history. When were you hired — well, did you work as a lifeguard for the City of Boca Raton?

A Yes, I did.

Q And when were you hired?

A I believe it was the summer of — it would have to be 1984, I think.

Page 42, lines 16-25; Page 43, lines 1-22

Q Do you recall Bill Terry ever making comments to you or about you or any inappropriate comments?

A I don't remember him ever saying anything to me or anyone else while I was there.

Q Okay. How about any inappropriate touching, did you ever see any of the male lifeguards touch a female lifeguard in a way you thought was inappropriate?

A No.

Q Were you yourself ever touched by anyone that you thought was offensive?

A No.

Q Did you ever complain to anybody that either Bill Terry or David Silverman was sexually harassing you?

A No.

Q Did you ever feel that you were being sexually harassed while you were working on the beach?

A No.

Q Do you recall any instances where — well, let me just start. Can you just describe the locker room atmosphere for me?

A The locker room. Okay.

Q You share a locker room. All the lifeguards share one locker room?

A Yes, ma'am.

Q And was there a lot of joking or horseplay that went on?

A It was usually pretty light. Everybody was usually pretty friendly and pretty — there was some joking and some — I don't remember any things getting really out of hand.

Q You described it as friendly. Did you ever find the joking that went on to be offensive?

A Not that I remember.

Page 43, lines 23-25; Page 44, lines 1-8

Q And there was one shower in the locker room?

A Yes, there was.

Q Do you ever recall being afraid to use that shower for fear a male lifeguard would try and come in?

A No.

Q Do you ever remember guarding the door so that male lifeguards would not come in?

A That I guarded the door or —

Q Yes, or that you were in there and asked someone to guard the door for you?

A No, I don't remember that.

Q Okay. How would you describe your relationship with Beth Ann Faragher during your employment on the beach?

A She was a friend, a good friend.

Q Do you still keep in contact with her?

A Yeah. I get letters from her, and every once in a while I will see her. For a while, there she was still working down in Boca for summers while I was — would go down and visit my sister. But I get a letter from her and write her on occasion.

Q Has she ever discussed this lawsuit with you?

A No, she has not.

Q Did she ever discuss sexual harassment in her employment with you?

A No.

Q Not while you were employed and not after?

A No.

Page 45, lines 14-21

Q Okay. When you were hired, did you get an

employee handbook from the City?

A Yes, I did.

Q Were you aware if you had a grievance or a complaint how to pursue that?

A Yes. It was in the handbook. I'm not sure if I can remember the specifics now, but I remember that it was stated in the handbook.

DEPOSITION TESTIMONY OF PAT MCGOWAN

Page 54, lines 7-25

Q Were you at one time employed by the City of Boca?

A Yes, I was.

Q What was your position with the City?

A I was a marine safety captain.

Q Okay. Can you give me the approximate dates of your employment as a marine safety captain?

A 1972, I think January of 1973, till fifteen years after that, full fifteen years.

Page 70, Lines 16-23

Q What was your relationship with Beth Faragher when you were there and she was there?

A Pretty much the same. She was also an above average employee. She was always to work on time, never had any problems, easy to get along with.

Q Did Beth Faragher ever complain to you about anything or anybody in connection with her job?

A No, sir.

Page 75, lines 19-25; Page 76, line 1; Page 93, lines 6- 12

Q Okay. Did anybody ever say to you that they thought Bill Terry had used sexually harassing words or conduct directed at or about anybody?

A No, sir.

Q Did anybody ever say to you that they thought David Silverman used sexually harassing words to or about somebody?

A No, sir.

Q With respect to complaints, did Nancy Ewanchew ever complain to you that she felt that Bill Terry was harassing her in a sexual way either through language or actions?

A No, sir.

Q Same question with respect to Beth Faragher: Did she ever voice such a complaint to you,

sir?

A No, sir.

TESTIMONY OF WILLIAM TERRY

Direct by Burke
Page 129, Lines 1-17

Q During the time period 1986 to 1990, let's discuss for Judge Highsmith, although he might have a very clear understanding of the chain of command, you were in the parks and recreation department; correct?

A Yes.

Q Who did you report to?

A Over the years it was —

Q The position?

A The position was recreation superintendent.

Q And above recreation superintendent was what, please?

A There was a parks and recreation director and a deputy director.

Q All right. And below you as marine safety chief were a couple or three captains; is that correct?

A Yes, sir.

Q And then the lieutenants and the guards?

A True.

Page 132, lines 4-25; Page 133, lines 1-14

Q With respect to your authority as marine safety chief or beach supervisor, I know you have been sitting here and that's ranged in the testimony from nothing to actually being the Wizard of Oz.

Could you tell us what power you had, what authority you had as marine safety chief in the area of hiring, firing, disciplining of employees?

A Whatever decisions were made on what you mentioned, such as hiring or firing or severe discipline problems, the marine safety unit, the beach section, myself and my staff, would make recommendations to what we call downtown; basically, that meant to the parks and recreation department director, and he, in turn, would add a memorandum to that or make a note on that and then send it off to personnel, and whatever they did with it, back came affirmative or negative or whatever or a meeting resulted in it to find out more information, or whatever.

Q If you wanted to hire an employee and the position was available, could you unilaterally do it without obtaining the approval from someone else, sir?

A Absolutely not.

Q If you wanted to fire an employee for cause or for no reason, assuming they weren't a classified employee, could you unilaterally do that?

A Absolutely not.

Q If you wanted to suspend an employee without pay and you had cause to do so, could you do that unilaterally without obtaining someone else's approval?

A No, sir. No.

Q You mentioned your staff would get together and make recommendations. Who's your staff?

A It varied over the years between one captain and myself to two captains and a training officer and myself. I tried to get lieutenants' inputs. Sometimes some of the problems came from the lieutenant's perspective, and we had to deal with them above that.

City of Boca Raton

[Logo]

CITY HALL • 201 WEST PALMETTO PARK ROAD • BOCA RATON, FLORIDA 33432 • PHONE: (305) 393-7700

February 26, 1986

TO: All Employees

FROM: James A. Rutherford
City Manager

SUBJECT: Sexual Harassment Policy Statement

Title VII of the Civil Rights Act declares that sexual harassment is an unlawful employment practice.

Under the guidelines effective November 10, 1980, the Equal Employment Opportunity Commission contends that sexual harassment, whether verbal or physical in nature, generates a psychologically harmful atmosphere that inhibits performance on the job. Employers have an affirmative duty under Title VII to ensure that the work situation is free of discrimination in any form, based on race, sex, color, religion or national origin. Under the guidelines, an employer is responsible for the actions of its supervisory employees or agents and in some cases for the acts of others when the employer or a supervisory employee knows of or should have known of the behavior.

The guidelines establish three basic criteria for determining whether an action constitutes unlawful behavior;

- If submission to the conduct is either an explicit or implicit term or condition of employment;
- If submission to or rejection of the conduct is used as a basis for an employment decision affecting the person rejecting or submitting to the conduct; or
- If the conduct has the purpose or effect of substantially interfering with an affected person's work performance, or creating an intimidating, hostile or offensive work environment.

Specifically, sexual harassment is deliberate or repeated unsolicited verbal comments, gestures, or physical contact of a sexual nature which are unwelcome.

The city of Boca Raton, in spirit and in law, is dedicated to a strong policy against discrimination based upon sex. Sexual harassment is unacceptable conduct and will not be condoned. It is imperative that all employees be assured a work atmosphere free from sexual harassment. Violations of this policy will be cause for disciplinary action up to and including dismissal.

PERSONNEL POLICY &
PROCEDURE MEMORANDUM

Subject: SEXUAL HARASSMENT MEMO NUMBER: V-2

Effective Date: FEBRUARY 26, 1986
Revision Date: MAY 7, 1990.

SEXUAL HARASSMENT

I. PURPOSE: To assure the City's compliance with Title VII of the Civil Rights Act, which requires a stated policy against sexual harassment in the workplace and penalties for violations.

II. POLICY: Under the guidelines effective November 10, 1980, the Equal Employment Opportunity Commission contends that sexual harassment, whether verbal or physical in nature, generates a psychologically harmful atmosphere that inhibits performance on the job. Employers have an affirmative duty under Title VII to ensure that the work situation is free of discrimination in any form, based on race, sex, color, religion or national origin. Under the guidelines, an employer is responsible for the actions of its supervisory employees or agents and in some cases for the acts of others when the employer or a supervisory employee knows of or should have known of the behavior.

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III. PROCEDURE:

1. Any employee who believes he or she has been the subject of sexual harassment should report the alleged act immediately to his or her department supervisor, department or division head or the Personnel & Labor Relations Director.

2. If a complaint involved a supervisor or manager, the complaint will be filed directly with the Personnel & Labor Relations Director or representative.

3. All complaints will be handled in a timely and confidential manner. Anyone involved in a complaint will be strongly discouraged from discussing the subject outside the investigation. The purpose of this provision is to protect the confidentiality of the employee who files a complaint, to encourage the reporting of any incidents of sexual harassment, and to protect the reputation of any employee wrongfully charged with sexual harassment.

4. Investigation of a complaint will normally include conferring with the parties involved and any named or apparent witnesses. Employees shall be guaranteed an impartial and fair hearing. All employees shall be protected from coercion, intimidation, retaliation, interference or discrimination for filing a complaint or assisting in an investigation.

5. If the investigation reveals that the complaint is valid, prompt attention and disciplinary action designed to stop the harassment immediately and to prevent its recurrence will be taken.

The City recognizes that the question of whether a particular action or incident is a purely personal

social relationship without a discriminatory employment effect requires a factual determination based on all facts in the matter. Given the nature of this type of discrimination, the City recognizes also that false accusations of sexual harassment can have serious effects on innocent individuals. We trust that all employees of the City will continue to act responsibly to establish and maintain a pleasant working environment, free of discrimination, for all. The City encourages any employee to raise questions he or she may have regarding discrimination or affirmative action with the City's Personnel Department.

EMPLOYEE HANDBOOK CITY OF BOCA RATON

This handbook was prepared by the Personnel Department, City of Boca Raton, and is based on the Personnel Rules and Regulations, Ordinance No. 2590, adopted January 23, 1979.

First Printing	February	1979
Second Printing	February	1981
Third Printing	June	1984
Revised	May	1986

* * *

Job Opportunity

The City of Boca Raton is an equal opportunity employer and prohibits discrimination because of race, color, creed, religion, national origin, sex, age, political affiliation or handicap in all aspects of its personnel policies, programs, practices and operations.

* * *

Your Supervisor

A very important individual to the new employee is the immediate supervisor. A supervisor is the leader of the work unit. This is a person who was chosen for a combination of experience, knowledge and ability. Your

supervisor will assign your work and explain the work rules and procedures applicable to your job. Your supervisor wants to help you become a good City employee and may have been the person who interviewed and recommended hiring you. So don't be offended if your work is criticized in a constructive way. Ask questions when you don't understand something; offer suggestions when you have a good idea. Remember, you are responsible to your supervisor for the performance of your work, just as your supervisor is responsible for the work of the entire unit.

* * *

Complaints or Grievances*

Occasionally, a problem or misunderstanding about work may arise. An employee may be bothered by a situation or may not understand a policy or procedure. In such case, don't keep it to yourself. See your supervisor and discuss the problem to see if there is something that can be done. You may also wish to speak to your division head or department head, or the Personnel Director.

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* Provisions of the section may differ from provisions of labor agreements.

The Personnel Rules and Regulations provide a formal grievance procedure which a permanent employee may use to pursue a grievance through the levels of management. A grievance is defined as a dispute involving the interpretation or application of a specific provision of the Personnel Rules and Regulations. Grievances

concerning an employee's suspension, demotion, dismissal, position reallocation or performance evaluation (unless based on factors other than performance) are excluded from the grievance procedure. However, suspensions, demotions and dismissals are appealable to the Civil Service Board. See the Personnel Rules and Regulations for more details.

* * *

ARTICLE 15
GRIEVANCE PROCEDURE

Section 1. Policy. It shall be the policy of the City of Boca Raton to provide a procedure for the presentation and mutual adjustment of points of disagreement which may arise between employees and their supervisors, and to assure employees that their problems and complaints will be considered fairly, honestly, and without reprisal.

Section 2. Purpose. The primary purpose of the grievance procedure is to determine WHAT is right rather than WHO is right. Free discussion between employees and supervisors will lead to a better understanding of the practices, policies and procedures which affect employment. It will also serve to identify and help eliminate conditions which have or may have caused misunderstandings and grievances. The purpose is defeated if a spirit of conflict enters into the consideration of a grievance. Supervisors and employees alike must realize and recognize the true purpose of a grievance procedure if such procedure is to have value in promoting the well-being of the City service.

Section 3. Definition of a Grievance. A grievance is defined as a dispute involving the interpretation or application of a specific provision of the Personnel Rules and Regulations, EXCLUDING disputes arising from an employee's suspension, demotion, dismissal, or performance evaluation, unless it is alleged that a performance evaluation is based on factors other than performance, or position reallocations.

Section 4. Procedure for Presentation of a Grievance.

(a) An employee with permanent status in the classified service shall take any grievance to his or her immediate supervisor within five (5) calendar days of the event giving rise to the grievance. The immediate supervisor who shall meet with the employee, review the grievance, make a decision, and advise the employee of the decision within five (5) calendar days of their meeting. It is neither necessary nor desirable that the grievance be presented in writing at this point. Supervisors are encouraged to consult with their department heads or any individual who may be able to offer assistance or information relative to the grievance.

(b) If the grievance is not resolved to the employee's satisfaction, by the supervisor, or if a decision is not made within the time specified, the employee may submit the grievance to the department head, in writing, within seven (7) calendar days of the immediate supervisor's response or, if a decision was not made within the time specified, within seven (7) calendar days of the date the response was due. The department head shall meet

with the employee, review the grievance, make a decision, and advise the employee of the decision in writing within ten (10) calendar days of receipt of the grievance.

(c) If the grievance is not resolved to the employee's satisfaction by the department head, or if the decision is not made within the time specified, the employee may submit the written grievance to the City Manager within seven (7) calendar days of the department head's response or, if a decision was not made within the time specified, within seven (7) calendar days of the date the response was due.

(d) Within thirty (30) calendar days of receipt of the grievance, the City Manager shall request that the Civil Service Board convene a hearing within thirty (30) days of the request to review the grievance.

It shall be the duty of the Civil Service Board, after considering all facts of the grievance as presented to the Board at a hearing called for that purpose, to prepare findings of fact solely on the merits of the evidence presented, and recommend a disposition of the grievance to the City Manager.

The Civil Service Board shall present its findings to the City Manager, and the employee.

(e) The City Manager shall render a final decision based on the findings of the Civil Service Board and all other findings in the case.

Section 5. General.

(a) Prior to a response by the immediate supervisor or by the department head to an employee's grievance,

said response shall be reviewed with the Personnel Director.

(b) Employees who are required to participate in a grievance meeting or hearing during their scheduled working hours shall be compensated at their regular rate of pay; however, no payment shall be made for participation during the employee's non-work hours.

(c) Employees who fail to process grievances in conformance with the time limits set forth above shall be deemed to have abandoned their grievance.

(d) Employees may represent themselves at all grievance meetings and hearings. In the presentation of a grievance, employees may be accompanied by a fellow employee. At any level of a grievance proceeding, the employee may elect to have a representative present the employee's position.

(e) There shall be no reprisals against any employee for participation in this grievance procedure.

* * *

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CITY OF
BOCA RATON

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as amended by:

Ordinance No. 2662, adopted August 28, 1979
Ordinance No. 2986, adopted September 8, 1981
Ordinance No. 3508, adopted March 25, 1986
Ordinance No. 3666, adopted November 24, 1987
Ordinance No. 3671, adopted January 12, 1988
Ordinance No. 3886, adopted November 13, 1990
Ordinance No. 3887, adopted November 13, 1990
Ordinance No. 3918, adopted April 9, 1991
Ordinance No. 3944, adopted July 9, 1991

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* * *

City of Boca Raton

_____(SEAL)

CITY HALL • 201 WEST PALMETTO PARK ROAD • BOCA RATON, FLORIDA 33432 •
PHONE: (305) 393-7700

March 4, 1986

Hand Deliver – March 4, 1986

John C. Calhoun
Marine Safety Lieutenant
Parks & Recreation Department

Re: Letter of Reprimand

Dear Lt. Calhoun:

On February 27, 1986 at approximately 8:55 a.m., you were observed pulling your bathing suit down at the morning meeting and exposing yourself in a manner described as a "mooning" action. Several lifeguards including a female member of the staff were present and observed this conduct.

Article 7 of the Personnel Rules and Regulations provide for disciplinary action when an employee:

> "(4) Has been guilty of conduct unbecoming an employee of the City of Boca Raton."

City employees have a right to work in an environment that is untainted by such wanton departures from common decency. Your conduct was wholly inappropriate for an employee, and even more unacceptable for a supervisor. You are, hereby, reprimanded for that misconduct and instructed not to engage in it or related behavior again. Further misconduct by you will result in more severe disciplinary action up to and including dismissal.

If you disagree with this action, you may grieve either through the Personnel Rules and Regulations – Article 15 or the I.B.F.O. collective bargaining agreement – Article 13.

Sincerely,

/s/ James A. Rutherford
James A. Rutherford
City Manager

JAR/mkl

cc: Personnel Department/File
Parks & Recreation Department/File
I.B.F.O. Local 1227 AFL-CIO

TO: MR. RICHARD BENDER, PERSONNEL DIRECTOR

FROM: MR. PAT MC GOWAN, MARINE SAFETY CAPTAIN
P & R DEPT/MARINE SAFETY DIVISION – RED REEF SECTION

SUBJECT: MARINE SAFETY LT. JOHN C. CALHOUN (611-646-1240)

REFERENCE: INCIDENT 2/27/86 – MARINE SAFETY HEADQUARTERS 8:50 A.M. – 8:55 A.M.

STATEMENT

On the morning of February 27, 1986, at approximately 8:50-8:55 a.m., I was finishing with our morning meeting and I noticed Lt. John Calhoun pull his bathing suit down and bend over. At first I thought this was directed at me, but regardless, this was a clear case of exposing himself with the rest of the patrol present. This entails from six to eight lifeguards, one of whom is female. I asked her how she felt and she responded that she was shocked. I advised her that I would try to do something about the situation and I would contact my supervisor Marine Safety Chief, Bill Terry.

WITNESSES: OLG Carol LaRue
OLG Steven Griffith
OLG Brendan McCarthy

I will be speaking with the other employees who were present and see if they are willing to come forward.

Lt. Calhoun was observed in a similar incident just two days prior, but not in the presence of a female employee.

I would like it clearly noted that this was not an accident but an intentional exposure.

I feel that this type of incident should be dealt with so as not to allow its repetition no matter who is present.

Our department and especially the image of the lifeguard would stand to harsh publicity and public discussion had any patron walked in at that particular time and I feel this is not a practice that should be allowed, no matter who is present.

/s/ Pat McGowan
MARINE SAFETY CAPTAIN
PAT MC GOWAN

Tuesday March 4, 1986

I contacted Marine Safety Headquarters shortly after 9:00 AM and requested John Calhoun pay me a visit in my office. John arrived at approximately 9:10 AM.

He asked what the problem was and I told him I was very concerned about his behavior of last week. He looked surprised and asked what he had done. I said I had some reports of his "mooning" his fellow workers in the guard room and his defense was that it was a 'joke'.

I told him that there were some who didn't consider his actions a joke and that they were shocked and offended, in particular the females. I asked him if he thought his actions, as a professional lifeguard and marine safety officer were appropriate, and I expressed concern regarding the loss of credibility among the guards he supervises on a daily basis, adding that I was disappointed in him.

He replied that he could see my point and apologized for offending anyone. He said he was not aware there were any females present and he assured me it would not happen again.

I told him I had referred the matter to the Personnel Director and was awaiting any action he felt was appropriate.

I thanked him for coming and in leaving he said "I guess I spent too much time in the Navy", whereby I replied that he had also spent a lot of years on the beach in Boca Raton.

From Lorraine Gardner

TO: MR. RICHARD BENDER
PERSONNEL DIRECTOR

FROM: MISS CAROL LA RUE
OCEAN LIFEGUARD

SUBJECT: JOHN C. CALHOUN

REFERENCE: INCIDENT 2/27/86 AT MARINE SAFETY HEADQUARTERS

On February 27, 1986 at approximately 8:55 p.m., I was standing at the guardroom doorway in the Marine Safety Headquarters building listening to Pat give the morning meeting announcements when John Calhoun "mooned" the majority of us in the locker room. It was something that mostly shocked me and something I don't want to see again.

/s/ Carol LaRue
CAROL LA RUE, OCEAN LIFEGUARD DATE

City of Boca Raton

(SEAL)

CITY HALL • 201 WEST PALMETTO PARK ROAD • BOCA RATON, FLORIDA 33432-3730 •
PHONE: (407) 393-7700

SUNCOM (407) 922-7700

December 2, 1988

Beth a. Faragher
Ocean Lifeguard/Marine Safety

Dear Beth:

You are cordially invited to attend a meeting with Thomas E. Alexander, Parks & Recreation Director, and staff; Amos Jackson, Parks Superintendent; Sandra Dioli, Recreation Superintendent; Christine Strasser, Golf Course Manager; Bruce Kauffman, City Librarian; Jeff Borick, Landscape Architect/Park Planner; and myself, Mickey A. Gomez, Deputy Parks & Recreation Director.

The meeting has been scheduled for Wednesday, December 14, 1988 at 8:15 a.m. and the duration will be approximately one hour, in the Multi-purpose Room at the Boca Raton City Library (200 N. W. 2nd Avenue). You are one of approximately 20 employees, from the Parks & Recreation Department, that will meet this month for the purpose of discussing the happenings within the department (and the City as appropriate). You are encouraged to ask questions regarding your division or areas of concern.

These meetings with the director and his staff will be held monthly, with the same purpose in mind, but with different employees invited each time. *Operation PRIDE* is

your program of employee to employee communications through all levels of management.

If for some reason you *CANNOT* attend the meeting, please call Georgia Pavlick at 393-7814. You will be invited again at a later date.

See you there,

/s/ Mickey A. Gomez

cc: Division Head
Section Head

City of Boca Raton

_____(SEAL)

CITY HALL • 201 WEST PALMETTO PARK ROAD
• BOCA RATON, FLORIDA 33432-3730 •
PHONE: (407) 393-7700

SUNCOM (407) 922-7700

July 8, 1988

Beth A. Faragher
Ocean Lifeguard/Marine Safety

Dear Beth:

You are cordially invited to attend a meeting with Thomas E. Alexander, Parks & Recreation Director, and staff; Amos Jackson, Parks Superintendent; Sandra Dioli, Recreation Superintendent; Christine Strasser, Golf Course Manager; Bruce Kauffman, City Librarian; Jeff Borick, Landscape Architect/Park Planner; and myself, Mickey A. Gomez, Deputy Parks & Recreation Director.

The meeting has been scheduled for Wednesday, December 14, 1988 at 8:15 a.m. and the duration will be approximately one hour at the Boca Raton Community Center. You are one of approximately 20 employees, from the Parks & Recreation Department, that will meet this month for the purpose of discussing the happenings within the department (and the City as appropriate). You are encouraged to ask questions regarding your division or areas of concern.

These meetings with the director and his staff will be held monthly, with the same purpose in mind, but with different employees invited each time. Operation PRIDE

is your program of employee to employee communications through all levels of management.

If for some reason you *CANNOT* attend the meeting, please call Georgia Pavlick at 393-7814.

See you there,

/s/ Mickey A. Gomez

cc: Division Head
Section Head

July 25, 1986

Bill Terry –

Hello – how are things going down at the beach? I've been having a busy but fun summer.

I'm looking forward to returning to Florida and to guarding at the beach as long as my position is still open.

As of now, I will back in Boca Raton right about the 18th of August to register for classes. I will be able to start work again Friday August 29th so I will have time to get settled back in. If I am able to start sooner I will notify you and Janice as soon as possible.

Hope everything is going well for you and everyone else.

Please give my regards to the others.

Thanks for everything –

/s/ Beth Faragher

Beth Faragher
3939 N.E. 5th Avenue
Boca Raton, Florida 33432

CITY OF BOCA RATON
Marine Safety Division
80 S. A1A (Ocean Blvd.)
Boca Raton, Florida 33432

Attention: Mr. Bill Terry
Marine Safety Chief

Subject: RESIGNATION

Dear Bill:

I respectfully submit this as my letter of resignation effective

In order to persue a family commitment up north, I will be away for the summer. I will be returning to school at FAU in the fall and hope that I might return to work for the summer on the beach.

It's been good working here and I appreciate your consideration in this regard.

Very truly yours,

/s/ Beth Faragher
Beth Faragher

BF:jc

P.S. I have locked my uniform and all issued equipment in my locker. Should the need arise, I hereby give you my permission to remove the lock for access and use of same.

My address up north is:

Beth Faragher
446 Richmond Park E. #228A
Richmond Hgts, Ohio 44143
PHONE: (216) 461-9291
Combination: 28-14-32

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

November 14, 1997

William Robert Amlong, Esq.
Amlong & Amlong, P.A.
500 Northeast Fourth Street
Fort Lauderdale, FL 33301

Re: 97-282 - Beth Ann Faragher v. City of Boca Raton

Dear Mr. Amlong:

The Court today entered the following order in the above stated case:

> "The petition for writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 29, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel or or before 3 p.m., Wednesday, January 28, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, February 18, 1998. Rule 29.2 does not apply."

Enclosed are Memoranda describing the procedures

under the Rules, together with a Specification Chart for your use. To further assist you in preparing your case before this Court, a copy of the Guide for Counsel is enclosed. Please note that request for extension of time to file briefs on the merits will not be entertained as this case will be argued in the March Session. The deferred appendix method may not be used.

If you have any questions, please feel free to telephone me.

Very truly yours,

WILLIAM K. SUTER, CLERK

/s/_____
Sandy Nelsen
Merits Clerk
(202) 479-3032

Enclosures

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 97-282

In The

Supreme Court of the United States

October Term, 1997

BETH ANN FARAGHER,

Petitioner,

vs.

THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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Attorneys for Petitioner

QUESTIONS PRESENTED

I. Is an employer, pursuant to common-law principles of agency, responsible for hostile-environment sexual harassment committed by supervisory employees who use their supervisory status to effectuate the harassment?

II. May a fact-finder infer notice to an employer of hostile-environment sexual harassment:

A. through actual notice to an intermediate supervisor, who reports it no further?

B. from the same pervasive nature of the harassment that makes it actionable?

C. by default through its failure to effectively disseminate any sexual harassment policy and instructions about how and to whom victims should complain?

LIST OF PARTIES

The parties to the proceedings in the Court whose judgment is sought to be reviewed here include those who appear in the caption of the case, as well as Nancy Ewanchew, who was a co-plaintiff, and Bill Terry and David Silverman, who were co-defendants with the City of Boca Raton. There is no parent or subsidiary of any party to be listed.

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Anne Scott Tyson, *U.S. Companies Move to Curb Sexual Harassment on Job*, Christian Science Monitor, May 30, 1996 ..... 38- 39

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OPINIONS BELOW

The opinions of the Court of appeals are reported at 76 F.3d 1155 (11th Cir. 1996) and 111 F.3d 1530 (11th Cir. 1997) (*en banc*) and are reproduced in the Appendix filed with the Petition for Certiorari ("App.") at 41a and 1a. The opinion of the district court is reported at 864 F. Supp. 1552 (S.D. Fla. 1994) and is reproduced at App. 69a.

STATEMENT OF JURISDICTION

The first decision of the United States Court of Appeals for the Eleventh Circuit was rendered on February 8, 1996, and was vacated May 13, 1996, 83 F.3d 1346 (11th Cir. 1996). The *en banc* Court of appeals decision was rendered April 15, 1997 and amended April 28, 1997.

The Court, through Justice Kennedy, on July 9, 1997, granted petitioner an extension of time until and including August 13, 1997, within which to file her petition for writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (Title VII), is set forth below:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin . . . .

STATEMENT OF THE CASE

Beth Ann Faragher in 1992 sued the City of Boca Raton and two of its lifeguard supervisors for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. The district court, following a five-day bench trial, found for Faragher on her Title VII claim, although rejecting similar state law claims against Respondent.[1]

---

[1] Faragher and Nancy Ewanchew, another lifeguard, also sued Bill Terry and David Silverman, the two supervisors, for sexual harassment under 42 U.S.C. § 1983 (Counts II and III), and asserted pendent state law claims for battery against Terry (Counts IV and V) and for negligent retention and supervision against the City (Counts VI and VII).

(continued...)

The district court analyzed the Respondent's Title VII liability for the conduct of Terry and Silverman under three distinct theories: constructive knowledge, actual knowledge and use of authority. It found the City liable on three bases: (1) Respondent had constructive knowledge of Terry and Silverman's conduct because it was so pervasive, App. 92a; (2) Terry and Silverman acted as agents of the Respondent when they harassed Faragher, so the Respondent was liable regardless of actual or constructive knowledge, App. 93a; and, (3) another lifeguard captain, who was also an agent of the Respondent, had actual knowledge. *Id.*

A divided (7-5) *en banc* Court of Appeals for the Eleventh Circuit accepted the district court's factual findings but found no liability. The majority rejected all three theories advanced by the district court. It found that Terry and Silverman did not use their authority in harassing Faragher and that the City had neither actual nor constructive notice of the harassment. App. 7a-18a.[2]

This Court granted certiorari on November 14, 1997.

---

[1](...continued)
The district court awarded Faragher $1 in nominal damages on her Title VII claim against Respondent, $10,000 in compensatory damages on her § 1983 claim against Terry and Silverman, jointly and severally, and $500 in punitive damages on her battery claim against Terry. Additionally, the district court entered judgment for Ewanchew on her battery claim against Terry and awarded her $35,000 in compensatory damages and $2,000 in punitive damages.

[2] The Court of appeals did not address the district court's denial of Faragher's state law negligence claim.

STATEMENT OF THE FACTS

The Sexually Hostile Work Environment

During the time that Petitioner worked her way through college from September 1985 through May 1990 as a lifeguard for Respondent, the environment in which she and the other women lifeguards worked was so pervasively abusive that the original court of appeals panel dismissed the Respondent's protestations to the contrary by observing that it "might have been clear error for the District Court, having credited Faragher's testimony, to find otherwise." App. 54a.

Bill Terry, the Marine Safety Chief, was a hands-on manager who, the district court found, "had a propensity to touch female employees on various parts of their anatomies, including the waist, neck, and buttocks . . . ." App. 73a, ¶ 15. He rubbed Faragher's thigh, put his arm around her and touched her buttocks between 15 and 30 times. Joint Appendix ("J.A.") 186-87.

David Silverman, a lifeguard lieutenant and later a captain, pantomimed cunnilingus outside Marine Safety Headquarters, J.A. 114, in front of Faragher and six to twelve other persons, J.A. 189-90. He tackled a fleeing Faragher on one occasion, and on another hefted her over his shoulder to carry her as he ran along a boardwalk. J.A. 176-77. Lieutenant Silverman invited Faragher to shower with him, J.A. 178-77, and pounded on the door to the showers in the unisex locker room (demanding to join the women who were bathing), J.A. 112, 178-77, prompting, as lifeguard Nancy Ewanchew recalled, "a lot of girls to go in the shower at the same time because we were afraid that one of these days that door was going to open and we didn't know what was going to happen." J.A.

112. Lieutenant Silverman also invited Faragher to spend rainy days in his truck, J.A. 180-81, the context for which invitation was Silverman's parody of a weather prediction: a rain forecast meant "a 40 per cent chance I'm going to get a blow job today." J.A. 111, 180. Silverman attempted (unsuccessfully) to kiss Faragher on the one time (out of the many that he asked) she went out with him for a beer. J.A. 172-73.

Both Chief Terry and Lieutenant Silverman disparaged and demeaned women, of whom they spoke about largely in terms of body parts. Terry critiqued Faragher's breasts ("she was man like and . . . she didn't have a chest"), J.A. 106, and those of Elizabeth Leen ("[W]hen God was handing out tits, [Elizabeth Leen] was at the head of the line.") J.A. 105. Lieutenant Silverman likewise commented at Marine Safety headquarters about the size and firmness of Faragher's breasts, voiced approval of her "nice ass" as she walked up the stairs to headquarters, J.A. 175, and shared with Faragher his "nice tits" assessments of beach patrons as he sat with her in her beach tower. J.A. 183. Lieutenant Silverman, in conversations with Faragher, would count the number of women assigned to his command as a lieutenant by saying he had twice that many "tits" on his beach that day. J.A. 110, 184.

Beyond Lieutenant Silverman's outdoor pantomime and his group-directed demands to join women in the shower, Chief Terry and Lieutenant Silverman also sexually harassed, on an individual basis, the other four to six women lifeguards (out of a total lifeguard corps of 40 to 50) who worked there at any one time. *See* App. 72a, ¶9. Chief Terry, Ewanchew recalled at trial, "would touch you and put his hands on you and reach towards you, your breast in a crowded room right

behind people that were standing there, he would reach around and laugh . . . ." J.A. 102. In what the district court found to be "a particularly egregious incident," Terry "pressed himself against [Nancy] Ewanchew's buttocks and moved his hips simulating sexual movement." App. 74a, ¶ 17.

With Kelly Evans, Chief Terry "would . . . grab her on the shoulder and pull her in real close and put his hand around her waist and grab her butt." J.A. 107. He put his arm around Gail Nye's shoulders and hips a half-dozen times,[3] grabbed Beverly Barta on the buttocks twice, J.A. 200, and slapped Victoria Bonner on the thigh as she was punching out her time card. J.A. 156. Jamie Harrington, whom Terry "touched and grabbed all the time," J.A. 107 once punched Terry for putting his hand on her thigh. J.A. 130-131.

Silverman, meanwhile, told an appalled Gail Nye during her first day on the job, "I want to lick your clit," R. 23:114, J.A. 140; informed Harrington, "It must be cold out because [her] nipples were showing," J.A. 127; solicited Leen, within earshot of Barta, to give him "a blow job" in his truck, J.A. 182, 201; and observed to Harrington as a beach patron passed the tower they shared that day that he would "love to eat between her legs." J.A. 129.

Terry used similarly inappropriate language to

---

[3] The trial was held from June 21 to 27, 1994. Because the court reporters did not assign consecutive volume numbers, we refer to the date in June for each volume. Any quoted material that is not part of the Joint Appendix, therefore, will be cited as Record ("R."), the day in June, 1994 the testimony was given and finally the page number. This section, for example, would be cited as R. 23:116-17 which refers to pages 116-117 of the transcript of June 23, 1994.

other women. He referred to female lifeguards as "cunts and sluts and bitches," J.A. 102, and told Ewanchew: "Men just don't marry a girl like you." J.A. 100. The "cunt" epithet was a favorite — one that Terry modified with "stupid" to describe Bonner to Harrington one day when Bonner forgot her radio, J.A. 125, and to refer to Bonner on another day in front of her lieutenant, J.A. 156; one (along with "bitch") that Terry used to describe a woman on another team at a lifeguard competition. J.A. 103-04. Terry asked Jamie Harrington if she had sex with a reporter who did a story about her. J.A. 130. When Bonner interviewed for her job, Terry inquired: "So, are you going to [have sex with] all the guys like the rest of the girls?" J.A. 154. Silverman, who was a lieutenant would sit with Ewanchew in her tower, regaled his supervisee with "disgusting" stories, J.A. 114, including, for example, one about having sex with a drunken beach patron while another lifeguard watched. J.A. 111.

Ewanchew, who worked as a Boca Raton lifeguard from April 1987 through April 1989, wrote to Richard Bender, the City's director of personnel and labor relations on April 23, 1990 (a year and a day after she had quit, and shortly after she had passed a probationary period at a new job), J.A. 119-20, and Defense Exhibit K, complaining of "extreme cases of sexual and verbal harassment going on at the City of Boca Raton's Beach Patrol," and naming Chief Terry and (by now) Captain Silverman as the perpetrators. Bender met with Ewanchew May 17, 1990, conferred with Terry June 5, 1990 and on June 18, 1990 interviewed five female employees, including Faragher. On June 26, 1990, Bender reported to the city manager that, *inter alia*: "All [the women] cited experiences of inappropriate language from Terry and Silverman. All indicated experiences of unsolicited touching by Terry . . . All of the women

indicated that these actions made them uncomfortable. . . ." R. 23:56. The City then reprimanded both and required Chief Terry and Captain Silverman to forfeit 160 and 40 hours of annual leave, respectively. App. 81a.

The district court concluded that Terry and Silverman's conduct was "sufficiently severe or pervasive to alter the conditions of Faragher's employment," and went on to hold that "[t]his finding of pervasiveness supports an inference of knowledge, or constructive knowledge, on the part of the City regarding Terry's and Silverman's sexual harassment. . . ." App. 92a.

The Supervisory Structure

During the time of Faragher's employment with the City, the reporting hierarchy within the Marine Safety Section was as follows: ocean lifeguards reported to Marine Safety Lieutenants, who reported to Marine Safety Captains, who reported to Terry, the Chief of the Marine Safety Section. App. 71a, ¶5. Terry was the highest ranking official at Marine Safety Headquarters. R. 24 at 173. Terry reported directly to the Recreation Superintendent, who reported to the Director of Parks and Recreation, who, in turn, reported to the City Manager. App. 71a, ¶¶5, 8. The district court found a clear chain of command in the Marine Safety Division, which vested in the Marine Safety supervisors both administrative and disciplinary authority over the lifeguards. App. 92a-93a.

Reporting to Terry were two operational captains, one training captain, six lieutenants, approximately sixteen full time and thirty-two part time lifeguards. R. 23:189. The district court specifically found that both Marine Safety Lieutenants and Marine Safety Captains

acted in a supervisory capacity *vis-a-vis* the ocean lifeguards. In particular, the court found Chief Terry, Lieutenant Silverman, and Training Captain Robert (Flash) Gordon to be supervisors of the ocean lifeguards. App. 71a, ¶6.

The district court found that, as Marine Safety Chief, Terry had the authority to supervise all aspects of the lifeguards' work assignments, to conduct counseling, to issue oral reprimands and to place reports of such disciplinary actions in the lifeguards' personnel files. App. 92a. Chief Terry also interviewed and selected new lifeguards, subject to approval by higher management. R. 23:36, 65. No one, during the twenty years that Terry was Marine Safety Chief, was hired without his recommendation. *Id.* at 36; R. 24:173. Chief Terry initiated firing and suspending personnel. R. 23:38; R. 24:173. Terry's evaluations of the lifeguards translated into salary increases. R. 23:39, 65. Terry made recommendations regarding promotions to lieutenant and captain. *Id.* at 44-45.

Lifeguard captains, according to Captain Richard Morrison, would help Terry complete evaluations and scheduling, would make sure lifeguards were in their towers with the correct equipment, would conduct morning meetings and training and were more or less overseers or foremen. R. 23:182.

The district court found that, as Lieutenant and later, as Captain, Silverman had supervisory responsibility over the lifeguards' daily duties, including designation of the lifeguards' work assignments, staffing of shifts and supervision of their physical fitness routines. App. 92a. Lieutenants made supervisory and disciplinary decisions and had input on the evaluations as well. J.A. 109. In

1989, Terry sent the lifeguards a memo telling them that Lieutenants were their immediate supervisors in the chain of command. J.A. 171-72. Lieutenants could write lifeguards up for discipline, as Faragher understood it. *Id.* Silverman underscored his authority when he told Ewanchew, in the course of supervising her in her tower, "[Y]ou will be making the rescue because I'm your boss." J.A. 109.

Despite the formal hierarchy, the district court found that the lifeguards' contacts with higher city officials, such as the recreation superintendent, were almost non-existent. App. at 93a. The Beach Patrol was far removed from downtown, and was run by Chief Terry without a high degree of accountability to the City. R. 23:178-79. According to Captain Morrison, one of the City's witnesses, Terry "was pretty much given to do what he wanted to do." *Id.* at 179. Captain Morrison also agreed that "Terry was more or less the law east of A-1-A," the highway that separates the beach from the rest of the City. *Id.* at 178. Lorraine Gardner, the recreation superintendent from 1974 until 1988, and Terry's direct boss, acknowledged that "Terry pretty much ran the show down at the beach patrol." *Id.* at 161. Ewanchew for example, witnessed a lifeguard who angered Terry — the lifeguard had become upset about the way in which Terry had spoken to the lifeguard's wife — be banished to bad towers (those without proper sun protection or missing a windscreen) and to a shift that the lifeguard did not want. J.A. 118-19.

Complaints to Captain Gordon

Robert (Flash) Gordon was a City lifeguard from 1981 to 1990, and became a Lieutenant and a Captain and training officer in the late 1980s. R. 21:152. In addition

to performing regular supervisory duties, Gordon often ran the morning workouts for the lifeguards. J.A. 152. According to Gordon, "practically all" of the women lifeguards who worked at the beach, including Faragher, Ewanchew, Harrington, and Nye, complained to him about sexually inappropriate "language and actions" by Terry and Silverman. *Id.* at 139-40. In addition, according to Ewanchew, Gordon "definitely saw and heard" sexual harassing incidents involving Terry and Silverman. J.A. 116.

Faragher specifically told Gordon about the time that Silverman tackled her after the morning workout, following it up with comments about her having "nice legs and ass but really no chest to speak of." J.A. 150-51. Nye told Gordon that as she sat in a tower with Lieutenant Silverman, he "invited her at lunch time to go back to his truck so that he could lick her clit." J.A. 140, 232. Nye also told Gordon that Lieutenant Silverman had called her a "cunt." J.A. 232. Leen complained to Gordon about Lieutenant Silverman's comments about her breast size and references to her "tits." J.A. 145. Ewanchew complained to Gordon about unwanted touching and verbal harassment. J.A. 144-45. Ewanchew told him that conduct from both Lieutenant Silverman and Chief Terry was "very offensive" to her and that she "wanted him to see if he could do something about it or try to stop it or tell them to stop it. And [she] asked him what [she] should do." J.A. 115.

Captain Gordon, upon hearing these complaints, discouraged each of the women from pursuing the matters further. He "advised them that in the past there have been times when going to City Hall wasn't as productive as we had hoped it would be." J.A. 146. Gordon also told the women to be careful about going to City Hall. J.A.

146. Ewanchew recalls Gordon responding "that the City didn't care" and "basically just to stick it out." J.A. 115. After she complained twice more to Gordon, he said, "I can't do anything, I'm powerless, . . . the City doesn't care and . . . there is nothing that can be done, . . . just stick it out." *Id.* Ewanchew overheard Gordon telling Faragher and Harrington the same thing when they complained to him, including stating "there [was] nothing he could do." J.A. 117.

Gordon's Responsibility to Report Sexual Harassment

In sharp contrast to Gordon's "stone wall" response to Faragher and the other female lifeguards, city officials testified that supervisors like Gordon had a responsibility to report sexual harassment or any inappropriate behavior up the chain of command. J.A. 227. Richard Bender, Director of Personnel and Labor Relations during the time of Faragher's employment, explained, "if a supervisor observes . . . sexual harassment or anything else that is inappropriate to the workplace, then . . . it's incumbent on that supervisor to report it to either me or someone else within the chain of command of the department or someone else in the City with the position of authority." *Id.*[4]

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[4] Bender also stated that "it is any employee's job who observes inappropriate behavior to bring it to the attention of their supervisor." R. 24:34. Gordon gave conflicting testimony about whether he understood that he had the authority to discipline and counsel Silverman. On the one hand, he acknowledged that he had tried to counsel Silverman in the past and had gone to city officials with problems about Silverman. R. 22: 9-13. On the other hand, he suggested that he did not know he had the authority "to record card or discipline a supervisor." J.A. 143.

Nevertheless, Gordon failed to report Faragher's and the other lifeguards' complaints to city officials. Gordon never informed the City Director of Personnel and Labor Relations or the Recreation Superintendent, Terry's immediate supervisor, that he was aware of sexual harassment. J.A. 227; R. 22:14-15. Indeed, the City never provided any training to Marine Safety Division supervisors on how to deal with complaints regarding sexual harassment by supervisors. Gordon testified that the City "never told [him] anything" about what to do if women employees complained to him about groping and bad language. J.A. 143.

The City's Sexual Harassment Policy

Prior to April 1990, the City had taken only one action regarding sexual harassment in its workforce — it had issued a single, written statement regarding sexual harassment dated February 26, 1986. J.A. 267. That statement, however, was not widely disseminated. The district court found

> a complete failure on the part of the City to disseminate said policy among Marine Safety Section employees. Neither Terry nor Silverman were ever told or made aware of the City's sexual harassment policy prior to Bender's [June 1990] investigation of Ewanchew's charges. Ewanchew herself never got a copy of the sexual harassment policy during her tenure with the City.

App. 83a. Based on this, the district court found the City "did not discharge its duty under the EEOC guidelines regarding the maintenance of an effective sexual

harassment policy." App. 83a, ¶52.[5]

Bender did not know if the 1986 policy had been posted at Marine Safety headquarters. R. 24:29. Terry "really [didn't] know" if he had ever received it. R. 23:34. The first time anyone in the City ever communicated anything about sexual harassment to Terry during his twenty-three year tenure was after Ewanchew's spring 1990 complaint to Bender. J.A. 257. Lieutenant Silverman did not recall ever hearing the term "sexual harassment" or being informed about any policy against it before spring 1990. *Id.* Captain Gordon had "never heard the word" sexual harassment until the investigation of Ewanchew's complaint in 1990. J.A. 141.[6] Lorraine Gardner, the Recreation Superintendent and Terry's boss from 1974 through her retirement in 1988, knew that there were laws against sex discrimination, but was unfamiliar with Title VII of the Civil Rights of 1964, and did not feel that it was her job to do anything to make sure

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[5] 29 C.F.R. 1604.11(f), of which the trial court took judicial notice, R. 23:55, provides as follows:

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

[6] In terms of imparting other skills and information and ensuring City-wide standards, however, Captain Gordon recalled that the City ensured that its lifeguards knew how to swim and to perform other necessary tasks, *id.* at 141-42, explained the City's insurance program to employees, *id.*, and sent out pamphlets about the City retirement fund. *Id.*

that people who worked for her did not engage in sexual discrimination or sexual harassment; she testified that "I personally didn't feel I had to do anything unless it was brought to my attention." J.A. 243.

The City similarly failed to notify non-supervisory employees of the sexual harassment policy. Faragher saw the sexual harassment policy for the first time after Ewanchew's spring 1990 complaint. According to Faragher, "[t]he City's policy kind of appeared after [Ewanchew's] letter was written." J.A. 188. Ewanchew did not recall the City ever telling her about the policy, affirmatively raising the subject of sexual harassment, expressing strong disapproval of sexual harassment or informing employees of their right to raise and how to raise the issue of harassment. J.A. 120-21. No one said anything to Bonner during the approximately three years that she worked there about her rights relating to sexual harassment. J.A. 157.

In addition to the gaps in distribution, the City's 1986 sexual harassment policy contained no reporting mechanism. P. Ex. 2; J.A. 267.[7] Thus, even if they had seen the policy, Faragher and the other lifeguards would have had no way of knowing how and to whom they could

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[7] The City on May 7, 1990, through a memorandum to "all department heads," issued a revised sexual harassment policy that it requested its supervisors to review and to post. Plaintiff's Exhibit 5(b), J.A. 269. The revision, according to Bender, had nothing to do with Ewanchew's complaint. J.A. 253-54. The revised policy urged any employee who feels he or she has been sexually harassed to report immediately to his or her supervisor, department or division head, or the personnel and labor relations director, ensures confidentiality, and promises protection "from coercion, intimidation, retaliation, interference or discrimination for filing a complaint or assisting in an investigation." J.A. 258.

complain.[8] See App. 84a, ¶53.[9] Alternative avenues also were not available. The employee handbook[10] simply directed employees with complaints or grievances to see their supervisors. P. Ex. 1; J.A. 274.[11] Yet Ewanchew did not know who Terry's boss was, or the names of other City officials; she testified that "we were never told the chain of command." R. 21:95. The only other complaint avenue was through collective-bargaining grievance procedures, which were only available to members of the collective bargaining unit. J.A. 225. Part-time employees like Faragher and most of the other female lifeguards had no such rights. R. 23:180; R. 21:25; J.A. 168.

In light of the lack of information and avenues of relief, Faragher and the other women had no way to assess the risks of coming forward. Faragher testified that she did not complain because she feared retaliation. According to Faragher, "I felt like if I did complain, there was probably a good possibility that I would lose my job,"

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[8] Not surprisingly, from 1986 until the receipt of Ewanchew's complaint in spring 1990, no female employee of the City of Boca Raton — which had approximately 1,300 employees, R. 23:187 — ever complained to Bender that a boss had "talked dirty to her" or "groped her." J.A. 257-58.

[9] The district court found that, "[i]n light of the City's lack of dissemination of its sexual harassment policy," Faragher's failure to file a grievance, in and of itself, does not absolve the City from liability. App. 84a, ¶53.

[10] Not until after Ewanchew complained in 1990 did the City address sexual harassment in its employee handbook. J.A. 258.

[11] While it stated, "[y]ou may also wish to speak to your division head or department head, or the Personnel Director," it emphasized that employees first see their supervisors. J.A. 274.

J.A. 187, and "[Chief Terry] had complete authority over me. As a part-time employee, I didn't have any protections. So if he wanted to fire me, it was my understanding that he could fire me." J.A. 169-70. Faragher also testified that "[i]t seem[ed] like Bill Terry could do things that . . . I thought were completely wrong and get away with it, because the City — or the people at City Hall would back him up or support him, and cover it up and just let it be." J.A. 189. Barta did not complain because "[t]hey could fire me at any time for any reason." J.A. 204. Nye also did not complain because she thought she would lose her job. J.A. 331. Likewise, Ewanchew was sure that she would be fired if she complained to City Hall about Chief Terry's conduct. J.A. 118. Ewanchew also feared that Terry would retaliate by giving her a bad recommendation at her new job; thus, she waited for her one year probation at her new position to pass before complaining to Bender. R. 23:208; J.A. 120.[12]

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[12] Ewanchew also feared retaliation from Lieutenant Silverman; she testified that "[Silverman] told me when I was sitting in the tower with him, that I am the boss and I can do what I want to do." J.A. 109.

SUMMARY OF THE ARGUMENT

This Court "decline[d] . . . to issue a definitive rule on employer liability, but . . . agree[d] with the [Equal Employment Opportunity Commission] that Congress wanted courts to look to agency principles for guidance in this area." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986).[13] Among those agency principles applicable to hostile-environment sexual harassment is the one that, "[i]n tort, masters are held answerable for conduct on the part of their servants, which they not only have not authorized, but have forbidden." Oliver Wendell Holmes, Jr., *Agency*, 4 Harv. L. Rev. 345, 348 (1891). The courts of appeal, however, have diverged on which agency

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[13] Section 219 of the Restatement (Second) of Agency (1958) provides as follows:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

principles to apply and how to apply them.[14]

Petitioner, Beth Ann Faragher, urges this Court to hold that employer liability for hostile-environment sexual harassment by a supervisor arises from one or both of two bases. The first ground for liability is for a supervisor's abuse of his authority, and is contained in § 219(2)(d) of the Restatement (Second) of Agency (1958). The second basis is knowledge, either actual or constructive.

Section 219(2)(d) makes an employer liable for a supervisor's use of his supervisory authority, implicit or explicit, to visit his sexual harassment on those who work for him. Whether the supervisor is abusing that power is a fact-intensive inquiry that necessarily would take into account the nature of the supervisor's powers, the circumstances of the harassment and the proven efficacy of any anti-harassment program.

The knowledge for which Petitioner seeks to hold employers liable is that of three kinds: (1) actual knowledge, through an employee whose job it reasonably should be to report the harassment up the line; (2) constructive knowledge that a fact finder may (but does not have to) infer from the pervasiveness requisite to make the harassment actionable to begin with; or (3)

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[14] *Compare Torres v. Pisano*, 116 F.3d 625 (2nd Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997); *Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir. 1994), *cert. denied*, 512 U.S. 1213 (1994); and *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987) *with Gary v. Long*, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, ___U.S. __, 116 S.Ct. 569, 133 L.Ed.2d 493 (1995). *See also Davis v. City of Sioux City*, 115 F.3d 1365, 1372 (8th Cir. 1997)(Arnold, C.J., dissenting) (for a fuller collection of cases on both sides of the issue)

constructive knowledge arising out of an employer's failure to put into place — and to activate, when appropriate — an effective sexual harassment policing mechanism that includes a zero-tolerance policy, an effective and discrete avenue of complaint and remedial action that is both prompt and effective.

Longstanding principles of agency, overlaid on the facts of the case at bar, propel this Court to find liability on each of those grounds. The Court of Appeals for the Eleventh Circuit erred when it created and applied to the instant case liability rules palpably different from the established principles of agency law.[15]

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[15] In the courts below, Petitioner relied on established agency principles as the basis of both her Title VII claims and her state-law claims against the Respondent City. Although the judgment of the court of appeals rejected both the federal and state claims, its opinion discussed only the application of agency law to a Title VII claim. The Court of Appeals for the Eleventh Circuit did not, however, suggest that the agency principles applicable to Petitioner's state-law claims in any way differ from those applicable to a Title VII claim; had that court believed that Florida agency law differed in some way it would presumably have analyzed separately Petitioner's state law claims. The agency principles set out *infra*, are, we urge, equally applicable to the Title VII and the state-law claims in this case.

ARGUMENT

I. AN EMPLOYER, PURSUANT TO COMMON-LAW PRINCIPLES OF AGENCY, IS RESPONSIBLE FOR HOSTILE-ENVIRONMENT SEXUAL HARASSMENT COMMITTED BY SUPERVISORY EMPLOYEES WHO USE THEIR SUPERVISORY STATUS TO EFFECT THE HARASSMENT.

An employer is liable for the sexually hostile environment created by a supervisor under § 219(2)(d) of the Restatement,[16] regardless of whether it knew or should have known of that behavior, if the supervisor was "aided in" perpetrating the harassment by the "existence" of the powers he possesses as a supervisor.[17] In many cases, as here, the supervisor's powers over the terms and conditions of the victim's employment will facilitate that harassment because the victim reasonably believes that she is at risk of retaliation if she resists, objects to or complains about that harassment. We do not contend that employers automatically should be held strictly liable for sexual harassment by supervisors. The dispositive issue under agency principles — whether the supervisor "was aided in accomplishing the [harassment] by the existence of the agency relation" — is obviously a factual question to be addressed in light of the record in each

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[16] The principle embodied in that section is a long standing one. *See County of Macon v. Shores*, 97 U.S. 272, 279 (1877)(county government liable for bonds issued by its county court, even though new administration claimed the prior administration's acts were *ultra vires)*.

[17] Liability can also be found pursuant to § 219(1) in cases in which a supervisor effectuates the offending behavior "within the scope of employment." This issue is discussed in the National Employment Lawyers Association's *amicus curiae* brief.

specific case. Resolution of that question requires the trier of fact to carefully assess, *inter alia*, the nature of the supervisor's powers,[18] the circumstances of the harassment,[19] and the proven efficacy of any anti-harassment program.[20] In most cases,[21] the question of fact will be whether the supervisor was aided in perpetrating the harassment by a reasonable fear on the part of the victim that she would face retaliation if she resisted, objected or complained to others.[22]

The record in this case is a textbook example of agents using what power they had in the circumstances to

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[18] The extent to which a victim's work is under the control of a particular supervisor, and the extent to which the supervisor's actions are constrained by rules unrelated to sexual harassment, would be relevant.

[19] Under one scenario, a more protracted or egregious pattern of harassment would indicate the potency of whatever might be deterring resistance and complaints. Under another, anonymous harassment perpetrated by a supervisor is less likely to be aided by fear of supervisory power, since the victim could not be certain the perpetrator was in fact a supervisor.

[20] The fact that a victim might in the past have complained without resulting retaliation about the actions of supervisors would be evidence that her ability to do so regarding sexual harassment was not impeded by fear of retaliation.

[21] In some cases, the supervisory power utilized may be the supervisor's ability to compel the subordinate to remain in his presence while he makes unwelcome remarks or engages in offensive sexual contacts.

[22] *Karibian v. Columbia University*, 14 F.3d 773,779 (2d Cir. 1994)("Ultimately, the question whether Karibian submitted to Urban's advances out of a reasonable fear of some job-related reprisal is properly one for the finder of fact.")

sexually harass those who work for them. The behavior that Chief Terry and Lieutenant Silverman inflicted on their subordinates through the creation of a hostile environment differed from *quid pro quo* harassment[23] more in degree than in kind: while it was less egregious sexual behavior, it still was an abuse of their supervisory authority.[24] The compliance which the harasser seeks to coerce is not sexual intimacy, but passive if unhappy acceptance by the victim of less intrusive sexual acts and contacts, or of verbal abuse of a sexual nature. The less egregious nature of the sexual activity, however, is by itself of no significance. If the supervisors in this case had threatened to dismiss Petitioner unless she permitted them to touch her buttocks or breasts, or to make crude remarks to her, that would have constituted *quid pro quo* sexual harassment, whether she had obeyed or had been fired for resisting. Hostile work environment cases involving supervisors differ from ordinary *quid pro quo*

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[23] An employer's liability for *quid pro quo* harassment is well established. *See, e.g. Nichols v. Frank*, 42 F.3d 503, 514-14 (9th Cir. 1994); *Karibian v. Columbia University*, 14 F.3d 773, 777-78 (2nd Cir. 1994); *Henson v. City of Dundee*, 682 F.2d 897, 909-910 (11th Cir. 1982); *see also Meritor*, 477 U.S. at 76 (Marshall, J., concurring).

[24] *Jansen v. Packaging Corporation of America*, 123 F.3d 490, 567 (7th Cir. 1997)(Wood, J., concurring and dissenting)("In the real world, sexual harassment does not sort itself into tidy categories. . . . When [a] supervisor bombards an unwilling subordinate with unwanted sexual images, touching, vulgar words, or denigrating comments, only the most committed formalist would feel confident in saying when those actions cross the imaginary line from 'hostile environment' harassment to '*quid pro quo*' harassment. . . . The critical question, for purposes of employer liability, turns on whether the supervisor has abused the powers the employer has entrusted to him; it does not turn on the way in which the supervisor has decided to abuse them.")

cases primarily in the explicitness with which the harassing supervisor exploits his supervisory power over the victim.[25]

Sexual harassment by supervisors is often aided by the same victim fears as those triggered by explicit *quid pro quo* threats, but grounded instead in implicit threats and obvious inherent dangers. As the EEOC has noted, "[a] supervisor's capacity to create a hostile environment is enhanced by the degree of authority conferred on him by the employer" which may "force an employee to endure a harassing environment for fear of retaliation." Equal Employment Opportunity Commission Policy Guidance on Sexual Harassment, 8 Fair Employment Practices Manual (BNA), at 405:6697 (March 19, 1990). Supervisors typically exercise broad discretionary powers over their subordinates, determining many of the terms and conditions of their employment, including their raises and prospects for promotion and controlling or greatly influencing whether they are to be dismissed. Supervisors and subordinates alike understand full well that a subordinate who incurs the displeasure of her superior, even for entirely personal reasons, is likely to find her employment made unpleasant, if not terminated altogether.

A supervisor's ability to harass a subordinate is often aided by her legitimate fear that the sort of abrupt rejection which she would unhesitatingly direct at a

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[25] As one court stated, "[i[mplicit quid pro quo harassment is a most serious matter. It is far more likely to take place than is the explicit variety. As time goes by and harassers learn that they can no longer victimize their prey at will, their actions become less overt." *Nichols v. Frank*, 42 F.3d 503, 512 (9th Cir. 1994)

stranger on the street,[26] or perhaps any resistance at all, would incur the wrath of the supervisor and precipitate a retaliatory use of his supervisory powers.[27] Ongoing control over the subordinate's activities and prospects[28] is a daily reminder of the risks that would be incurred by any objection. Sexual harassment is about power — the power of a harassing supervisor to inflict on a female subordinate conduct that he could not impose on any unwilling woman outside of the employment context.[29]

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[26] Outside of the work environment, a woman facing such abusive conduct has available an important arsenal of methods for solving such problems — suitably blunt language, a well deserved slap or the ability to exit quickly. When the harassment happens on the job, however, the victim's ability to protect herself is far more limited. One reason that employers are obligated to protect workers from sexual harassment is that the employer itself requires the victim to remain in the very situation in which the abuse is occurring and in which her own ability to protect herself is severely limited.

[27] *See, e.g. Saxton v. American Tel. & Tel. Co.*, 10 F. 3d 526, 529 n. 4, 532 n. 11 (7th Cir. 1993)(supervisor allegedly retaliated against the victim when she rebuffed his advances).

[28] Any harassment victim who may need a future job reference from the employer in question may well refrain from complaining even just before or after she resigns, for fear that the supervisor in question would retaliate by giving her an adverse reference. *Jansen*, 123 F.3d at 51 (Posner, C.J., concurring).

[29] *Id.* at 497 n.4 (Flaum, J.)("a supervisor, by virtue of his position in a hierarchy, always posses a degree of leverage over a supervisee"); *id.* at 512 (Posner, C.J.)("Even if the supervisor is scrupulous in forbearing to invoke his authority over the employee he is harassing, the existence of that authority is a fact of which the victim is bound to be constantly aware. She is more likely than in the case of a coworker to submit and less likely to complain."); *Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1977), *rev'd on other grounds*, 568 F.2d 1044 (3d Cir.

(continued...)

That power arises precisely because such a perpetrator is "aided in accomplishing the [harassment] by the existence of" his powers as a supervisor.[30]

Indeed, the disproportionately large number of sexual harassment incidents involving supervisors[31] reflects this critical aspect of the relationship between supervisors and subordinates. If, in the instant case, had Faragher been the Captain, and Terry and Silverman mere lifeguards, and had Terry and Silverman even briefly engaged in the conduct at issue, Faragher would either have dismissed them on the spot or exiled them to some remote beach where they would never cross her path. The virtual non-existence of cases in which subordinates sexually harass their supervisors reflects the fact that the actual or potential exercise of supervisory powers by the harassing supervisor often lies at the very heart of this misconduct.

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[29](...continued)
1977)("the power inherent in a position of authority is necessarily coercive . . . every sexual advance made by a supervisor would be made under the apparent cloak of that authority. Any subordinate knows that the boss is the boss whether a file folder or a dinner is at issue").

[30] Harassment is often facilitated as well by the fact that the supervisor, rather than the subordinate, controls whether the subordinate must remain in the supervisor's presence when the harassment is occurring.

[31] Barbara Lindemann & David D. Kadue, *Sexual Harassment in Employment Law* (1992), foreword by Hon. Alex Kozinski ("every woman . . . who has spent a substantial amount of time in the work force in the last two decades can tell at least one story about being the object of sexual harassment."); Barbara Gutek, *Sex and the Workplace* 62 (1985)(half of all incidents of harassment reported by women involved supervisors).

A "*hostile* work environment" is by definition an environment the victim would avoid if able to do so; "*unwelcome* sexual advances" are by definition advances the victim would prefer to end. Such sexual harassment can only continue if something is preventing or deterring the victim from effectively resisting or correcting those abuses. Often it is the agency powers of a harassing supervisor which disenables the victim from doing so. Recent studies,[32] as well as court cases,[33] demonstrate that

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[32] *See*, Matthew S. Hesson-McInnis & Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. Applied Soc. Psychology 877, 895-96 (1997)(most working women who complained to employers about sexual harassment reported that their complaint made things worse); Judith I. Avner, *Sexual Harassment: Building a Consensus for Change*, Kan. J.L. & Pub Pol'y 57, 73 (Spring 1994)(of 84 respondents amongst 300 women filing sexual harassment complaints with the N.Y. State Division of Human Rights, 54 per cent resigned and 41 per cent were terminated after complaining); Louise F. Fitzgerald, *Violence Against Women in the Workplace*, Am. Psychologist, 1070, 1072 (1993) (50 per cent of women who filed a complaint in California were fired; another 25 per cent resigned due to stresses of the complaint process or the harassment itself); *see also* Louise F. Fitzgerald & Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. Soc. Issues, 117, 122-23 (1995)(most common reason why victims don't complain is fear of retaliation; e.g., 1992 study of Navy found that one third of sexual harassment victims were humiliated in front of others when they complained).

[33] *See, e.g. Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863 (7th Cir. 1995)(affirming judgment for air freight clerk placed on unpaid maternity leave after complaining about supervisor's sexual harassment, for which she had gotten a "misrepresentation of facts" writeup); *Daniels v. Leoveridge*, 32 F.3d 1472 (10th Cir. 1994)(affirming judgment for plaintiff fired four days after complaining to foreman about supervisor's sexual harassment);

(continued...)

complaints of sexual harassment can yield grief perhaps even more often than relief. Against that body of experience, it is entirely understandable that large numbers of harassment victims do not file internal complaints. Title VII should not be construed to limit access to judicial relief to harassment victims willing to sacrifice or imperil their jobs.[34]

The implicit or even explicit threat of a supervisor's displeasure or retaliation would be of far less consequence if the supervisor and subordinate alike knew with certainty that the subordinate had available to her the means to thwart any adverse actions which the supervisor might seek to take. A supervisor could not impose his presence and offensive conduct on a subordinate unable to flee his presence if the supervisor and subordinate knew that she could bring about his prompt dismissal for any such advances. In either situation, despite his usual

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[33](...continued)
Davis v. Tri-State Mack Distributors, Inc., 981 F.2d 340 (8th Cir. 1982)(affirming judgment for secretary whose harassing supervisor "nitpicked" her work after she complained while company imposed additional requirements for her taking medical leave and accused her falsely of rudeness to customers and unauthorized absences); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195 (5th Cir. 1992) (affirming constructive-discharge verdict for drafting technician who was reassigned to supervisor who made repeated lewd advances and frequently touched her inappropriately, and who docked her pay for the day that she spent at manager's office complaining about him).

[34] It is the risk of such retaliation, indeed, that keeps many women — as several of the women lifeguards in this case testified was the case with them — from filing either internal complaints or Title VII charges until after they have resigned or been fired. *See* Susan Estrich, *Sex at Work*, 3 Stan. L. Rev. 813, 847-53 (1991)(courts tend to ignore the fact that women who complain are likely to face retaliation).

supervisory authority over ordinary employment matters, the supervisor could not effectively wield those powers to facilitate harassment of the subordinate. In the instant case, for example, if Beth Ann Faragher had been the daughter of the mayor of Boca Raton, Terry and Silverman, although able to control such things as the beach to which she was assigned, clearly could not have relied on their supervisory powers, or a threat of the abuse thereof, to sexually harass her. The first instance of such an abuse of supervisory powers would have had clearly foreseeable disastrous consequences for the perpetrators. Few employees, however, are in the happy position of enjoying the immunity from supervisory abuse that is a prerequisite of being the boss' daughter.

In the case at bar, Respondent is liable for Chief Terry and Lieutenant Silverman's sexual harassment of Petitioner because the City imbued them not only with authority over the everyday details of lifeguards' jobs, but also with power to deter resistance or complaints. That power derived from their abilities to make hiring recommendations, to effect pay raises through personnel evaluations, to obtain undated resignation letters, and to banish complainants to undesirable towers or unwanted shifts. Viewing Terry and Silverman's behavior through that prism, one reasonably could conclude that while Respondent may not have commanded Terry and Silverman, or even openly licensed them, to "Go sexually harass women lifeguards," the City delegated to them authority that they could — and did — wield to harass subordinates in a way that they could not have done if the women had not worked for the City.

Chief Terry ran the City's beach as if it were his own — and Respondent allowed him to do so. Most of the women lifeguards were part-time employees with no civil

service protection (which mirrors most of the nation's employees' at-will status). Terry's ability to visit revenge upon any who crossed him was legendary. City Hall had not clearly communicated zero-tolerance of sexual harassment.

In such an atmosphere, sexual harassment was the rule, not the exception. The atmosphere was one of unbridled licentiousness and petty, workaday tyranny — a culture in which Lieutenant David Silverman dared to pantomime cunnilingus in front of Marine Safety headquarters, in which others watched a complaining lifeguard trudge off to a distant tower with no sun protection, and in which Captain Gordon cautioned women against complaining. A reasonable conclusion that Chief Terry and Lieutenant Silverman could get away with behaving as they did, based on their actually having gotten away with it for so long, was all the more induced by the absence of any effective procedure by which Petitioner and the other women could know that they could fight back. The same laxness that the City displayed towards sexual harassment both made Petitioner and the other women fearful of complaining *and* at the same time emboldened Chief Terry and Lieutenant Silverman to behave as they did.

II. RESPONDENT HAD KNOWLEDGE, BOTH ACTUAL AND CONSTRUCTIVE, OF TERRY AND SILVERMAN'S SEXUAL HARASSMENT OF PETITIONER.

A. Gordon's (and the City's) Actual Knowledge

The identification of individuals whose knowledge *is* knowledge of their employers is governed by principles of agency. The well-established rule is that an employer is

charged with "knowledge of an agent concerning a matter as to which . . . it is his duty to give the principal information." Restatement (Second) of Agency § 272.[35] This rule applies to knowledge on the part of any employee, supervisor or subordinate, of whatever rank or station, who has a duty to disclose the information to the employer. City officials expressly conceded that Gordon was under just such a duty.

The facts here are not in dispute. Robert (Flash) Gordon, a lifeguard lieutenant and later a captain — whom Bender, the City's personnel manager, testified had a duty to report sexual harassment, or any inappropriate behavior, up the chain of command — displayed a neglectful nonchalance to complaints of one woman lifeguard after another. Captain Gordon's response was to claim impotence on the grounds that "the City doesn't care." What Respondent cannot say, however, is that the City did not know — for Captain Gordon's knowledge *is* the City's knowledge.

The Court of Appeals for the Eleventh Circuit, however, dismissed Gordon's undisputed actual knowledge as irrelevant because "he did not rank as higher management in the City." App. 15a.[36] Nothing in

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[35] Similarly, § 275 of the Restatement provides that "[t]he principal is affected by the knowledge which an agent has a duty to disclose to the principal...."

[36] The District court concluded that Gordon was an agent who "knew of the lifeguards' discomfort with Terry's and Silverman's conduct but failed to report the complaints brought to him either to Terry or to the City's management," concluding that "[t]his knowledge on the part of the City's agent, and the agent's inaction, provides a further basis for imputing liability to the City."

(continued...)

agency law, however, requires notice only to "higher management"; the most that is required is that the knowledge be on the part of someone with an obligation to act on that knowledge. Courts considering such questions have attributed knowledge to companies based on the knowledge of relatively low level employees.[37] The post-*Meritor* EEOC Policy Guidance, meanwhile, treats knowledge of any "supervisor"[38] (other than a perpetrator)[39] as sufficient.

The court of appeals also dismissed Captain Gordon's failure to report the information he received from the women lifeguards because "Gordon did not receive that information as the City's agent; he received it as a friend held in high repute by his colleagues." App.15a, n. 9. What led Faragher and other women lifeguards to speak with Gordon, however, is irrelevant under agency

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[36](...continued)
App. 93a. The District court so held even in the face of its specific statement that Terry, Silverman and Gordon were not "higher management." App. 71a, ¶7.

[37] The Restatement cites as examples employees who sell a horse, do a title search, or manage rental property. Restatement (Second) of Agency § 272, cmt c. *See also id.* cmt. d (railroad conductor).

[38] *See, e.g., Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1320-21 (8th Cir 1994) (liability imposed on employer because managers from several states present at party where offensive videotape was shown).

[39] Under established agency principles knowledge by a supervisor of *his own* harassing activities does not constitute knowledge by the employer where, as is ordinarily the case, that harassment is unauthorized. Restatement (Second) of Agency §§ 271, 280, 496 (1958).

principles; "[e]xcept for knowledge acquired confidentially, the time, place, or manner in which knowledge is acquired by a servant or other agency is immaterial in determining the liability of his principal because of it,"[40] "since the mind of the agent cannot be divided into compartments, the principal should be bound by whatever knowledge the agent has, irrespective of its source or time of acquisition . . . ."[41]

Gordon was "someone who (a) has under the terms of his employment, or (b) is reasonably believed to have, or (c) is reasonably charged by law with having a duty to pass on the information to someone within the company who has the power to do something about it." *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997)(reversing summary judgment against plaintiff who complained to her department head about harassment by her foreman) (citing *Torres v. Pisano*, 116 F.3d 625, 636-38 (2nd Cir. 1997).)[42]

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[40] Restatement (Second) of Agency § 276. Unlike in *Torres v. Pisano*, 116 F.3d 625 (2nd Cir. 1997), "a situation in which an intimidated and embarrassed employee was finally able to gather the strength to complain about the harassment that she had been enduring, but specifically asked the supervisor to whom she complained to keep the matter confidential and to refrain from taking action until a later date," there is no evidence in this record that Faragher or anyone else asked Gordon to keep quiet about their complaints.

[41] Restatement (Second) of Agency § 276, cmt. a.

[42] An analogy illustrates the flaw in the *en banc* majority's logic: if Faragher had told Gordon at an off-duty party that Terry and Silverman were stealing cash from beach patrons, Gordon surely would have been disciplined for not passing on that information. No logical distinction can be made between theft on

(continued...)

As pointed out by one of the dissents below, not only does Gordon's knowledge of the complaints support a theory of direct liability for the acts of Terry and Gordon, but Gordon's response to the women lifeguard's complaints — i.e., that the City did not care — is "evidence of the City's lack of concern [that] also supports the district court's finding of constructive notice." App. 39a, (Anderson, J., dissenting).

B. Constructive Knowledge, Based on Pervasiveness

This Court in *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), quoting *Meritor*, held that Title VII is violated by hostile environment sexual harassment "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' 477 U.S. at 65, that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' *id.*, at 67. . ." 114 S.Ct. at 370. In the case at bar, the district court, after recounting multiple incidents of sexually inappropriate behavior by Chief Terry and Lieutenant Silverman, found "Terry's and Silverman's conduct sufficiently severe or pervasive to alter the conditions of Faragher's employment and create an abusive working environment." App. 92a. The court went on to hold: "[T]his finding of pervasiveness supports an inference of knowledge, or constructive knowledge, on the part of the City regarding Terry's and Silverman's sexual harassment, making the City indirectly liable for such conduct." *Id.*

The District court's finding is consistent not only with

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[42](...continued)
one hand and sexual harassment on the other.

common sense, but also with the EEOC's working model of sexual harassment enforcement[43] and the experience of the courts.[44] The district court's attribution of constructive knowledge to the Respondent also is consistent with the record in this action, which supports findings of such pervasiveness of sexual harassment as to give rise to constructive knowledge. Under Federal Rule of Civil Procedure 52(a), such a factual finding can only be overturned if "clearly erroneous." *Pullman-Standard, Inc. v. Swint*, 456 U.S. 273 (1982) (determination of racially discriminatory intent an issue of fact on which district court may not be reversed absent clear error). "[F]actfinding is the basic responsibility of district courts, rather than appellate courts . . . ." *DeMarco v. United States*, 415 U.S. 449, 450 (1974). In *Anderson v. Bessemer City*, 470 U.S. 564 (1985) (reinstating district court's determination that city had discriminated on basis of sex in hiring recreation director), this Court noted that the clearly-erroneous standard "plainly does not entitle a

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[43] "Ways by which . . . constructive knowledge could be demonstrated include by the pervasiveness of the harassment." Equal Employment Opportunity Commission Policy Guidance on Sexual Harassment, Fair Employment Practices Manual (BNA), at 405:6695. "Employers usually will be deemed to know of sexual harassment that is openly practiced in the workplace or well-known among employees." *Id.* at 405:6696.

[44] *See, e.g. Jansen*, 123 F.3d at 511 (Posner, C.J., concurring)(employer "ought to take steps to correct the problem" if, *inter alia*, "the harassment is so pervasive (considering its nature, frequency, and the number of victims and perpetrators) that the employer knows or should know about the harassment"); *Carr v. Allison Gas Turbine Div. Gen. Motors*, 32 F.3d 1007, 1009 (7th Cir. 1994)("the greater the harassment — the more protracted or egregious, as distinct from isolated . . . or ambiguous, it is — the likelier is the employer to know about it or to be blameworthy for failing to discover it").

reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." 470 U.S. at 573.

Here, however, the court of appeals disregarded the district court's finding on what plainly was a factual issue, i.e., just how pervasive was the sexually harassing behavior going on at the beach. In the circumstances of this case, the court of appeals could not conclude, within the strictures of Rule 52(a), that the district court's finding regarding pervasiveness was clearly erroneous. The undisputed facts in this case reveal a four-year pattern of systemic harassment by two perpetrators against at least eight different women.[45] One of the dissents correctly noted that "[t]he determination of constructive notice is based on factual findings which this court will not overturn unless they are clearly erroneous." App. 21a (Barkett, J., dissenting), and observed that, "[n]onetheless, the majority essentially engages in *de novo* review, substituting the trier of fact's assessment of the record with its own." *Id.*

C. Constructive Notice Based on the Absence of an Effective Policing Mechanism

To the extent that City officials did not know that Terry and Silverman were harassing Petitioner and the other women lifeguards within the Marine Safety Section, that is because the City virtually sought ignorance. Although the City promulgated a "policy" in 1986, the City's personnel director was unclear as to whom or how

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[45] They were Faragher, Ewanchew, Harrington, Bonner, Barta, Nye, Evans and Leen.

it ever was distributed. The district court found there had been a "complete failure on the part of the City to disseminate its written sexual harassment policy among Marine Safety Section employees," App. 94a. Further, the policy was palpably deficient in at least three respects: (1) it failed to tell employees how or to whom to complain if they experienced sexual harassment; (2) it imposed on no employee — witness or supervisor — an express duty to report sexual harassment;[46] and (3) it contained no assurances for either victims or witnesses of confidentiality or non-retaliation.

Traditional agency principles require an employer to exercise reasonable care to learn of and prevent injuries to its employees.[47] Courts[48] and academicians[49] alike have

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[46] *See Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 946 (1997) ("a procedure that does not require a supervisor who has knowledge of an incident of sexual harassment to report that information to those who are in a position to take appropriate action falls short of that which might absolve an employer of liability"); *Jansen*, 123 F.3d at 511, 513 (Posner, C.J., concurring)(effective anti-harssment policy must include anti-retaliation measures); *see also Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987)("[t]hough the intent was commendable," the company's policy failed because "not only was it vague on paper, it was vague and ad hoc in its implementation and did not function effectively to eliminate harassment . . . .")

[47] "A master is subject to a duty that care be used . . . to provide working conditions which are reasonably safe for his servants and subservants. . . ." Restatement (Second) of Agency § 492. That duty of care requires an employer to consider the risk that injury may be inflicted on employees due to the negligence or misconduct of other employees. *See id.* § 493 & cmt. b.

[48] *See, e.g., Jansen*, 123 F.3d at 496-497, n. 3 ("as Judge Easterbrook pointed out in oral argument, statistically

(continued...)

perceived that sexual harassment is a persistent and entirely foreseeable problem — especially for women, such as Faragher and the other women lifeguards here, holding traditionally male jobs.[50] This recognition

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[49](...continued)
speaking, every employer should anticipate harassment"); 123 F.3d at 511 (Posner, C.J., concurring)("Everyone knows by now that sexual harassment is a common problem in the American workplace . . .").

[49] *See, e.g.*, Deborah L. Rhode, *Speaking of Sex* 99 (1997) (more than half of all women experience sexual harassment during their academic or working lives); Barbara Gutek, *Sex and the Workplace*, 46 (1985) (53 per cent of all women had experienced sexual harassment on the job); Anne Scott Tyson, *U.S. Companies Move to Curb Sexual Harassment on Job*, Christian Science Monitor, May 30, 1996 (sex discrimination complaints of which were up 165 per cent since 1990, comprised 30.7 per cent of Equal Employment Opportunity Commission's caseload); U.S. Merit System Protection Board, *Sexual Harassment in the Federal Workplace* 20 (1995)(two-thirds of 400 women surveyed in 1993 largest service and industrial firms reported experiencing sexual harassment within the last year); Barbara Gutek, *Understanding Sexual Harassment at Work*, 6 Notre Dame J. of Law, Ethics & Pub. Pol., 335, 344-45 (1992)(studies revealing that 33-66 per cent of women reported being harassed within the previous year or two; 88 per cent of women in one survey reported having been harassed at some prior point in time).

[50] *See Carr v. Allison Gas Turbine Div., General Motors*, 32 F.3d 1007, 1012 (7th Cir. 1994); *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010, 1012 (8th Cir. 1988); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991); *see also* Deborah L. Rhode, *Speaking of Sex* 101-02 (1997) (women who experience harassment in male-dominated workplaces often are seen as inviting the abuse, or oversensitive because abusive language and pornography are "a natural thing" in "a man's world"); Matthew S. Hesson-McInnis & Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. Applied Soc.
(continued...)

militates for imposition of liability on an employer who fails to take reasonable steps to guard against the known danger of sexual harassment in the workplace. Such reasonable care should, at minimum, include a vigorous prevention program[51] and an effective enforcement

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[50](...continued)
Psychology 877, 897 (1997); Anne Scott Tyson, *US Companies Move to Curb Sexual Harassment on Job*, Christian Science Monitor, May 30, 1996 (sexual harassment is worst in male-dominated industries; citing 1992 Chicago study that 83 per cent of tradeswomen had experienced sexual harassment); U.S. Merit System Protection Board *Sexual Harassment in the Federal Workplace* ix, 17 (1995) (employees who "work exclusively or mostly with people of the opposite sex and [who are] supervised by members of the opposite sex" are more likely to experience sexual harassment); Ronni Sandroff, *Sexual Harassment Survey Results*, Working Woman, June 1992 (harassment becomes much more common when women enter predominantly male workplaces).

[51] The EEOC — following this Court's demonstration of a clear lack of enthusiasm in *Meritor* for generalized policies that do "not address sexual harassment in particular, and thus [do] not alert employees to their employer's interest in correcting that form of discrimination" and do not "encourage victims of harassment to come forward," 477 U.S. at 72-73 — has provided specific guidance regarding essential elements of an efficacious anti-harassment program:

> [A]n effective preventative program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. . . . It should ensure
(continued...)

mechanism.[52]

The danger of requiring less is illustrated by the arguments in one of the dissents below:

> [A]n employer reading the court's opinion may conclude that it, like the City of Boca Raton, can escape Title VII liability by having a policy against sexual harassment but concealing from its employees the identity of the person to whom claims are to be made. Because such concealment would have the potential for reducing claims of sexual harassment,

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[51](...continued)
confidentially as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

EEOC Policy Guidance on Sexual Harassment, 8 Fair Employment Practices Manual (BNA), at 405:6699 (March 19, 1990).

[52] The EEOC policy guidance calls for an enforcement mechanism that would function as follows:

> When an employer receives a complaint or otherwise learns of sexual harassment in the workplace, the employer should investigate promptly and throughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct. . . . The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation.

Id. at 405:6700.

> and thus the cost of doing business, an employer might choose to follow the City's footsteps. The employer's other alternative, of course, would be to identify the person to whom complaints are to be made and to have an efficient mechanism for investigating them and taking curative measures when necessary. No system is perfect, however. Thus, an employer with a model system in place cannot render itself immune from claims. In weighing the costs of the two alternatives, an employer may opt for the course the City took in this case. That course may yield more sexual harassment but less liability, and thereby dilute the employer's Title VII duty.

App. 36a, Tjoflat, J., dissenting.

In the case at bar, Respondent's failure to effectively promulgate and enforce a sexual harassment policy during the late 1980s gave rise to constructive knowledge of the sexually harassing behavior.

CONCLUSION

For the above reasons, the decision of the Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

BETH ANN FARAGHER,
Petitioner,

v.

THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT THE CITY OF BOCA RATON

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QUESTION PRESENTED

Whether in a hostile-environment sexual harassment case an employer can be held liable for discrimination under Title VII on the basis of conduct by low-level supervisors that was outside the scope of their employment, where the employer neither knew nor should have known of the conduct, where the supervisors did not exercise any supervisory authority to aid or facilitate the harassment, and where there was prompt remedial action taken when the employer did learn of the conduct.

LIST OF PARTIES

In addition to the parties named in the caption, the other parties in the court of appeals were plaintiff-appellant and cross-appellee Nancy Ewanchew and defendant-appellees William Terry and David Silverman.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-282

BETH ANN FARAGHER, *Petitioner*,

v.

THE CITY OF BOCA RATON, a political subdivision of the State of Florida, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT THE CITY OF BOCA RATON

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-40a) is reported at 111 F.3d 1530. The order vacating the panel opinion is reported at 83 F.3d 1346. The panel opinion (Pet. App. 41a-68a) is reported at 76 F.3d 1155. The opinion of the district court (Pet. App. 69a-104a) is reported at 864 F. Supp. 1552.

STATUTE INVOLVED

This case concerns Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 253, 255, which provides:

It shall be an unlawful employment practice for an employer—

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

> with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (1994 ed.).

STATEMENT OF THE CASE

A. Underlying Facts

In five years of working for the City of Boca Raton, from September 1985 through June 1990, petitioner Beth Ann Faragher never complained to anybody in the City's management about the existence of unwelcome or unwanted conduct by any of her supervisors or co-employees. Petitioner made no such complaint even though she knew, as early as the Fall of 1989, that she would be leaving employment with the City to go to law school. J.A. 196-98. Petitioner did not make any complaint of her own even after former lifeguard Nancy Ewanchew submitted a letter complaining of sexual harassment in April 1990, and even after Ewanchew urged petitioner to do so as well. Indeed, Faragher still refused to come forward even after she knew that the City was conducting an investigation as a result of Ewanchew's complaint, and even after she reviewed the City's revised sexual harassment policy, which was distributed in May 1990, and which explicitly urged employees to report offending conduct. Trial Testimony, June 22, 1994, 213-15; J.A. 269-72. Faragher did not come forward at any time of her own volition; instead, the City's Director of Personnel and Labor Relations, Richard Bender, initiated contact with her as part of the investigation that the City conducted after receipt of Ewanchew's letter. J.A. 256. That investigation led to immediate disciplinary action against William Terry and David Silverman, the two City employees who acted inappropriately. Pet. App. 80a.[1]

[1] Petitioner never told either Terry or Silverman that she found their conduct offensive. J.A. 196, 198. Nor did she tell the other captains (who were not alleged to have engaged in sexual harassment) that she was offended by Terry's and Silverman's conduct. J.A. 196-97; 263-64.

Ewanchew's April 23, 1990 letter to Bender marked the first time that the City learned of any allegations of sexual misconduct by its employees in this case. J.A. 248-49; Pet. App. 81a. The letter was written more than a year after Ewanchew left employment with the City. Pet. App. 83a. Ewanchew wrote only the one letter and directed it specifically to Bender. Promptly after receiving the letter, Bender met with Ewanchew, investigated her allegations, and reprimanded and punished Terry and Silverman. In particular, Terry forfeited 160 hours of annual leave, and Silverman forfeited 40 hours of annual leave. Pet. App. 80a. The district court found "that the City acted with dispatch to investigate Terry's conduct and to discipline him after confirming that he had indeed engaged in inappropriate behavior." Pet. App. 102a-103a. There is no allegation that any employee or ex-employee of the City of Boca Raton ever experienced retaliation for complaining of sexual harassment or unwelcome conduct.[2]

Petitioner worked as an ocean lifeguard for the City of Boca Raton from September 1985 until June 1990. J.A. 167. She worked with Terry and Silverman during her entire tenure at the beach. J.A. 193. For her first three years of employment with the City, Faragher worked part-time during the school year, returning each fall to the same position at the beach after taking leaves of absence for the summers. J.A. 191. After her first season, in July 1986, petitioner wrote to Terry telling him that she was looking forward to returning to the beach. J.A. 295. In 1988, after graduation from college, she took a

[2] Before Ewanchew's letter, there were no complaints of sexual harassment occurring at the beach. There was, however, one other incident at most marginally related to this subject matter. In 1986, Mr. Calhoun, a lieutenant at the beach, was disciplined for "mooning" the other lifeguards during a meeting. J.A. 249-52; 285-90. There was no allegation that the woman lifeguard, Carol LaRue, who was involved in the complaint regarding that incident experienced any retaliation.

full-time position in retail sales. Thereafter, petitioner quit that position and was re-employed at the beach full time. She never sought alternative employment because she enjoyed her job at the beach. J.A. 192-93. Moreover, Faragher did not discourage her sister from applying for a job as a Boca Raton ocean lifeguard. J.A. 198. Faragher did not discuss sexual harassment with her good friend Kelly Evans, who was another female lifeguard in the City's employ. J.A. 261; *see* Pet. App. 78a, 90a. Nor did Faragher ever complain to other female lifeguards about Terry's or Silverman's inappropriate conduct. Pet. App. 90a. Petitioner resigned her job in 1990 to attend law school. Her decision to leave was unrelated to her work environment. Pet. App. 72a-73a.

The City's ocean lifeguards were part of the Marine Safety Section of the City's Parks and Recreation Department. The Chief of the Section was directly supervised by the Recreation Superintendent,[3] and the Recreation Superintendent reported to the Director of Parks and Recreation. The Director of Parks and Recreation reported to the City Manager. Within the Marine Safety Section's chain of command, lifeguards reported to lieutenants, and above them to captains. The captains in turn reported directly to the Chief of the Marine Safety Section. Pet. App. 71a. Marine Safety Headquarters "was far enough away from City Hall as to constitute a remote location." Pet. App. 84a; *see also id.* at 16a ("The lifeguards were stationed at a remote location and had little contact with City officials.").

During the time that Faragher worked as a lifeguard, Terry served as Chief of the Marine Safety Section and

[3] Lorraine Gardner was Recreation Superintendent from 1974 until 1988, and Sandra Dioli-Kumm held the position from 1988 to 1989. Pet. App. 71a-72a. Faragher did not complain to either one about Terry's conduct. J.A. 240-42; 234-36; Trial Testimony, June 22, 1994, 207-08. Ewanchew met with Dioli-Kumm to discuss other work-related issues on several different occasions, but failed to complain about any hostile work environment. Pet. App. 81a.

Silverman served first as a Marine Safety lieutenant and then as a captain. The district court explicitly found that neither Terry nor Silverman "had the standing necessary to qualify as higher management for the City." Pet. App. 71a; *see also id.* at 84a. Petitioner does not challenge this finding. As Chief of the Section, Terry had the authority to supervise all aspects of the lifeguards' work assignments; to give oral reprimands and place reports of disciplinary actions in personnel files; and to interview and select new lifeguards, subject to approval by higher management. Pet. App. 92a. As lieutenant and later as captain, Silverman supervised the lifeguards' daily duties, including designating work assignments and supervising physical fitness routines. *Id.*

At any given time during the period of petitioner's employment, there were usually four to six female lifeguards out of a total of 40 to 50 lifeguards. Because of limited facilities, the lifeguards shared one small locker room and shower. The work environment at the beach was somewhat boisterous and rambunctious. The guards shared a sense of camaraderie with one another. Pet. App. 72a. Some teasing, sexual banter, and off-color language was not unusual among the guards in the locker room, and both male and female lifeguards participated. J.A. 122; 152-54; 193-96; 235-36; 244-45; 259-60. Many of the lifeguards also socialized with one another outside of the workplace. J.A. 157.

During the course of Faragher's five years of employment as a lifeguard, Marine Safety Chief Terry touched her shoulders or waist on a number of occasions, patted her thigh once in April 1990, and slapped her on the buttocks once. Pet. 5. Faragher did not see Terry touch any other lifeguard inappropriately. Faragher testified that she never heard Terry use any offensive or vulgar language.[4] Trial Testimony, June 22, 1994, 226.

[4] Petitioner's testimony as to the complete absence of offensive language from Terry was echoed by two other female lifeguards, Gail Nye, J.A. 231, and Kelly Evans, J.A. 259, as well as by Janet

Kelly Evans, a lifeguard from 1984 to 1988, testified that she did not witness or experience any offensive touching by Terry. J.A. 258-59. Some other lifeguards testified to isolated incidents of touching by Terry. To catalogue those instances: Jamie Harrington, who worked as a lifeguard for more than five years, testified that Terry touched her once, on her thigh. She further stated that when he did it, she punched him in the arm and he never touched her again. J.A. 133-34. Victoria Bonner, who worked from 1989 to 1992, also testified that Terry touched her once on the thigh. J.A. 158. She did not see Terry touch any other guard. J.A. 159-60. Beverly Barta, who worked full-time from January to April 1989 and then part-time until 1992, testified about two incidents in which Terry grabbed her buttocks after a morning meeting. J.A. 200. She did not see Terry touch any other lifeguard inappropriately. J.A. 202-03. Ewanchew described two specific incidents in which Terry touched her in a sexually offensive manner. Pet. 5. Gail Nye testified that the only touching by Terry was an arm around her shoulder or hip, which occurred a half dozen times. Nye acknowledged that this conduct might seem innocent to a casual observer, although it made her uncomfortable. Trial Testimony, June 23, 1994, 116-18.

The district court found that Silverman made an offensive comment to Faragher, that on one occasion he made an offensive pantomime gesture in her presence, and that

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Chisesi, the Marine Safety clerk-typist from 1984 to 1987, Trial Testimony, June 23, 1994, 148, and Kathryn Buhr, a secretary in the Marine Safety office from November 1989 to September 1990. J.A. 161-63. Other female lifeguards testified as to some infrequent inappropriate remarks by Terry. Jamie Harrington recalled two incidents of foul language and one inappropriate remark, J.A. 125-26, 130, and Victoria Bonner heard one remark from Terry that she characterized as offensive, and she testified that one of the lifeguard lieutenants told her that Terry made another inappropriate remark. J.A. 154-56. As to Ewanchew's testimony about remarks by Terry, the district court found that "his remarks in Ewanchew's presence were more directed toward other women." Pet. App. 74a.

he once tackled her. Pet. App. 76a. After Silverman became a captain, "he cleaned up his act," and did not engage in any additional offensive conduct. J.A. 131-32, 138. Bonner, who joined the lifeguards shortly before Silverman made captain, testified that she had "no problems with Silverman." J.A. 160. Harrington recalled only two crude remarks by Silverman during her five-year tenure. J.A. 138. Nye recalled two instances of inappropriate comments by Silverman. Trial Testimony, June 23, 1994, 114-15. Barta stated that Silverman often used vulgar language and recalled overhearing one inappropriate sexual remark directed at another woman lifeguard. J.A. 201. Evans testified to one crude comment by Silverman that did not bother her. Pet. App. 78a.

Prior to Ewanchew's letter of complaint in April 1990, the lifeguards generally did not discuss with each other their experiences with Terry or Silverman. J.A. 132-33; 159; 205-06; Trial Testimony, June 24, 1994, 46-47. Faragher did speak about Terry's and Silverman's conduct with former Marine Safety lieutenant and later training captain Robert Gordon. It is not clear from the record when this occurred; indeed, Faragher's conversation with Gordon may have occurred *after* Ewanchew's letter to the City's Director of Personnel in April 1990. Trial Testimony, June 22, 1994, 5-6; *id.* at 213-14. Other female lifeguards also complained to Gordon about Terry's and Silverman's language and conduct. The lifeguards did not speak with Gordon on a subordinate to superior basis; they spoke with him as a friend whom they held in high regard. Pet. App. 82a. Gordon did not report the complaints to his supervisor, Terry, or to any other City official. *Id.* The district court found that, like Terry and Silverman, Gordon did not have the standing necessary to qualify as higher management for the City. Pet. App. 71a. The court therefore did not impute to the City Gordon's knowledge of the complaints by Faragher and other lifeguards about Terry and Silverman. Pet. App. 84a.

The City had a written sexual harassment policy that was promulgated on February 26, 1986. The policy was

contained in a memorandum from the City Manager addressed to all employees. J.A. 267-68. Although Richard Bender, the City's Director of Personnel, testified that the memorandum was "distributed to the departments for posting and issued with paychecks to City employees," J.A. 253, the district court found that the City failed to disseminate the policy among Marine Safety Section employees. Pet. App. 83a. The City revised and reissued its policy in May 1990 (not as a result of Ewanchew's letter). J.A. 253-55; 269-72. Faragher received and reviewed a copy of the revised policy in May 1990. J.A. 188.

B. Proceedings In The District Court

On January 6, 1992, more than a year and a half after Terry's and Silverman's discipline, Faragher and Ewanchew filed suit against the City of Boca Raton, Terry, and Silverman. After a non-jury trial, the district court returned a mixed decision. The court found Terry and Silverman liable to Faragher under 42 U.S.C. § 1983, Pet. App. 99a, but it ruled in favor of Terry and Silverman on Ewanchew's Section 1983 claim, finding that Ewanchew "did not perceive the environment as abusive." Pet. App. 101a. The court found Terry liable to both Faragher and Ewanchew on their claims of battery. Faragher was awarded $10,000 in compensatory damages against Terry and Silverman, jointly and severally, and she was awarded $500 in punitive damages against Terry. Ewanchew was awarded $35,000 in compensatory damages and $2,000 in punitive damages against Terry alone. Pet. App. 103a-104a.

The district court rejected Faragher's and Ewanchew's common-law claims that the City had negligently retained and supervised Terry. The court based its dismissal of these claims on its finding that the City had no actual or constructive notice of Terry's conduct. Pet. App. 102a-103a. The court held: "Applying the standard of a reasonable employer to the City, the Court finds insufficient proof to establish that the City should have become aware of problems with Terry's conduct prior to Ewanchew's

letter." Pet. App. 103a. Petitioner has not sought review in this Court with respect to the dismissal of her common-law claims against the City.

With respect to Faragher's Title VII claims against the City, the district court found the City liable and awarded Faragher $1 in nominal damages.[8] Pet. App. 103a. By separate order dated March 27, 1995, the district court held the City, Terry, and Silverman jointly and severally liable for Faragher's attorneys' fees. J.A. 96-98.

The court ruled that Terry's and Silverman's conduct was sufficiently severe or pervasive to create a hostile working environment for Faragher, despite what the court referred to as "Faragher's attenuated reaction to such environment." Pet. App. 90a. More specifically, the court stated:

> The effect of the environment created by Terry's and Silverman's conduct upon Faragher is more *difficult to quantify*. Based on Faragher's testimony, the Court has no doubt that Faragher neither invited nor appreciated her supervisors' conduct. Faragher, however, seems to have gone about her business despite such conduct without complaining to anyone except Gordon. Indeed, Faragher does not appear to have found the Marine Safety Section atmosphere sufficiently adverse to caution her own sister against applying for a position there. Faragher's position as a part-time and summer employee, and her concomitant college studies, may help explain her *apparent nonchalance* regarding the environment created by Terry and Silverman. Moreover, Faragher does not

[8] Faragher had originally brought a Title VII claim against Terry and Silverman individually, and she sought joint and several compensatory damages, as well as declaratory and injunctive relief, against all three defendants. By pre-trial order dated August 13, 1992, the court struck the claim for compensatory damages against the City (because all of the events at issue occurred before enactment of the Civil Rights Act of 1991, *see Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)), struck the request for declaratory and injunctive relief, and dismissed the claim against Terry and Silverman individually. J.A. 76-77.

> appear to have been exposed as much as Ewanchew to overt physical acts by Terry.

Pet. App. 90a (emphasis added).[6] With respect to the City, the court expressly stated that "[t]he Court *does not* find that the City's management knew of the respective acts complained of by Faragher and Ewanchew prior to Bender's receipt of Ewanchew's letter." Pet. App. 84a (emphasis by the court).

The City has always urged—and continues to urge—that the improper conduct of its supervisors that was directed at, or witnessed by, Faragher during her five years of intermittent employment as a lifeguard was, as a matter of law, not " 'sufficiently severe or pervasive to alter the conditions of [Faragher's] employment and create an abusive working environment.' " *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (*quoting Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). The district court, however, not only rejected the City's position as to the existence of a hostile working environment but it also held the City liable for that environment under Title VII. The court relied on three alternative theories that it ruled provided a basis for liability despite the court's finding that the City had no actual knowledge of Terry's and Silverman's harassment.

First, the district court ruled that Terry's and Silverman's behavior was not only sufficiently pervasive to create a hostile work environment but that the same finding of "pervasiveness" was also sufficient to support "an inference of knowledge, or constructive knowledge" on the part of the City. Pet. App. 92a. The court reached this conclusion even though, in rejecting Faragher's and Ewanchew's common-law negligent retention claims against the

[6] Oddly, the district court concluded in a single opinion that Ewanchew "did not perceive the environment as abusive," Pet. App. 101a, that Faragher was not exposed as much as Ewanchew to overt physical acts by Terry, Pet. App. 90a, but that Faragher nevertheless was subject to an environment that altered the conditions of her employment and "unreasonably interfered with [her] work performance . . . ." Pet. App. 89a, 90a.

City, it found that the City had no actual or constructive notice of Terry's conduct. Pet. App. 102a-103a.

Second and third, the court held that, taking into consideration the "overall workplace structure," as well as the supervisory authority of Terry, Silverman, and Gordon, all three men were acting as "agents of the City." Because Terry and Silverman were acting as agents of the City, the court held, the City is "directly liable" under Title VII even in the absence of any actual or constructive notice to the City of the harassing conduct. Pet. App. 93a. Similarly because Gordon was acting as an "agent of the City" in failing to report the complaints brought to him, the court concluded that liability could be imputed to the City based on the agent's knowledge and inaction. *Id.* The court did not find that Terry's and Silverman's supervisory authority over Faragher contributed to or facilitated the harassment. *Id.*

C. The Decision Of The Court Of Appeals Panel

Faragher and Ewanchew appealed, and the City cross-appealed.[7] A panel of the court of appeals reversed the district court's ruling against the City on Faragher's Title VII claim and otherwise affirmed. The panel concluded that, although Terry and Silverman had created a hostile work environment for Faragher, none of the district court's alternative theories for holding the City liable under Title VII was meritorious.

Addressing first that portion of the district court's decision that focused on Terry's and Silverman's supervisory authority and the structure of the Marine Safety Section workplace, the panel observed that petitioner did not contend, and that the record in any event would not support a contention, that Terry and Silverman acted within the scope of their employment when they harassed Faragher. Pet. App. 59a, 63a. Nor was there evidence that Terry's and Silverman's exercise of their supervisory authority

[7] Faragher and Ewanchew appealed the district court's ruling that the City was not liable on the plaintiffs' claim alleging negligence in the City's retention and supervision of Terry.

somehow aided or facilitated their harassment of Faragher. Pet. App. 63a-64a & n.14. The panel ruled that Terry and Silverman did not invoke their authority over petitioner when they engaged in their harassment and that therefore the district court erred in relying on the structure of the Marine Safety Section workplace as a basis for Title VII liability. Pet. App. 61a-63a.

The panel similarly rejected that portion of the district court's decision that based Title VII liability on Gordon's failure to report Terry's and Silverman's sexual harassment. Noting the district court's finding that Gordon did not rank as higher management, and that notice to him could not be imputed to the City, the panel held that the district court erred in concluding that Gordon's knowledge regarding Terry's and Silverman's conduct provided a basis for holding the City liable. Pet. App. 66a & n.16. The panel stressed that, as the district court found, "Gordon did not receive that information as the City's agent; he received it as someone held in high repute by his colleagues." *Id.; see also* Pet. App. 82a.

Finally, the panel rejected the district court's ruling that the pervasiveness of Terry's and Silverman's harassing behavior was in and of itself sufficient to give the City constructive notice of their wrongful conduct. Although the panel was prepared to assume that "[t]here may be cases in which it is difficult to draw the line where conduct becomes so pervasive that the employer should have known about it," the court held that "this is not such a case." Pet. App. 67a. The court observed that the district court had expressly found that the City had no actual knowledge of Terry's and Silverman's conduct. *Id.* The court also noted that neither the district court nor Faragher had identified any factual basis in the record to conclude that the City should have known of Terry's and Silverman's conduct. *Id.*

D. The Decision Of The En Banc Court Of Appeals

In response to Faragher's petition for rehearing, the court of appeals vacated the panel decision and heard the

case en banc. The only issues discussed by the en banc court concerned the question of the City's liability under Title VII. In all other respects, the en banc court affirmed the decision of the district court. Pet. App. 5a n.3.

The en banc court declared that it would address the following two issues:

> (1) whether the City may be liable under Title VII for Terry's and Silverman's hostile environment sexual harassment of Faragher, regardless of its actual or constructive knowledge of that harassment; and
>
> (2) whether the City knew or should have known of Terry's and Silverman's hostile environment harassment of Faragher.

Pet. App. 5a. On both issues, the en banc court concluded, like the panel, that the City was not liable.

The principal difference between the en banc decision and the panel decision was that the en banc court switched the way in which the labels "direct" and "indirect" were used to refer to the different theories of the City's liability. Following the Restatement (Second) of Agency § 219 (1958), the en banc court used the term "direct" to refer to liability based on the theory that the City knew or should have known about Terry's and Silverman's wrongdoing, and failed to take appropriate corrective action. The court used the term "indirect" to refer to liability based on the theory that the harassment occurred within the scope of the supervisor's employment or that the supervisor's agency relationship with the City somehow aided or facilitated the supervisor's harassment of his subordinate, and that the City therefore could be liable on a vicarious basis, without any showing of fault. Pet. App. 7a-8a & n.4.

The en banc court turned first to the question of whether the City could be held indirectly liable for Terry's and Silverman's harassing behavior. The court stated that "[t]his case presents the archetypical example of employees stepping outside of the scope of their employment and seek-

ing to further personal ends." Pet. App. 12a. It further observed that "[n]o person threatened to fire or demote Faragher for refusing to accommodate Terry's and Silverman's harassing overtures" and that "Terry and Silverman were not aided in accomplishing the harassment by the existence of any agency relationship with the City." Pet. App. 13a-14a. The court also stressed that "there is no evidence that either Terry or Silverman made any employment decisions based upon Faragher's response to their sexual overtures." Pet. App. 13a. For all these reasons, the court held that the City could not be held liable on an indirect liability theory. Like the panel and like this Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the en banc court refused to impute sexual harassment liability to an employer merely because the harasser possessed supervisory or disciplinary authority over the person who was being harassed.

On the issue of direct liability, the en banc court ruled that "the district court clearly erred in finding that the City's knowledge may be inferred from the fact that the conduct was pervasive enough to create an abusive work environment." Pet. App. 17a. Although the en banc court said that there may be cases in which harassing conduct becomes so pervasive that the employer should have known about it, it held that this case does not fall in that category. Pet. App. 16a-17a. The court commented that neither Faragher nor the district court identified any factual basis for concluding that the City should have known about the misconduct. The court also held that Faragher's complaints to Gordon did not provide a basis for holding the City directly liable, since Gordon did not occupy a higher management position and, in any event, he received the complaints not in his capacity as an agent of the City but as a friend of Faragher and other lifeguards. Pet. App. 15a & n.9.

SUMMARY OF ARGUMENT

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), this Court explicitly held that the court of appeals had "*erred* in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.* at 72 (emphasis added). The Court then directed the lower courts to turn to common-law agency principles for guidance in determining when and under what circumstances an employer will be held liable under Title VII for sexual harassment by one or more of its supervisory personnel. Petitioner does not take issue with the holding in *Meritor* that employers are not strictly liable for their supervisors' sexual harassment. Nevertheless, petitioner has urged this Court to adopt a test that rests on the victim's fear of retaliation if she complains—a test that will result in automatic liability in cases in which the harasser is a supervisor. Petitioner's test is inconsistent with both *Meritor* and common-law agency principles.

In cases of hostile-environment sexual harassment such as this one, the proper standard of employer liability is negligence, regardless of whether the harasser was a supervisor or co-worker of the plaintiff. A review of common-law agency principles illustrates that negligence—not vicarious liability—generally is the proper standard of liability for cases of hostile-environment sexual harassment. Moreover, a negligence standard best supports the policies underlying Title VII.

In addition to her proposed "fear of retaliation" test, petitioner seeks to create one or more per se rules for imposing liability on an employer. In particular, petitioner contends that actual notice to any employee in any supervisory role constitutes actual notice to the employer, regardless of what level of authority the supervisor may occupy; what his duties and responsibilities are; what, if any, relationship he may have to the alleged harassment; and in what capacity and under what conditions he may have learned of the alleged harassment. Such a rule assumes lines of reporting and responsibility that typically do not exist in the workplace. If adopted, it would place a premium on ambush and surprise, while

at the same time deterring the effective communication necessary to deal with the problem of hostile-environment harassment. An employee would enhance the prospects of her planned litigation, while at the same time not affording her employer any realistic opportunity to address the situation, if she were to notify a subordinate supervisor instead of higher management empowered to deal with the alleged problem.

Petitioner's second proposition mixes apples and oranges. The "severity" and "pervasiveness" that suffices to create a hostile environment for a specific employee does not necessarily have any bearing on what the employer knew or should have known. As the district court's different rulings with respect to the claims of Faragher and Ewanchew show, the existence of a hostile work environment depends not only on the objective perspective of the "reasonable employee" but also on the subjective view of an individual plaintiff. The considerations that bear on whether an individual plaintiff actually and reasonably perceived her work environment as hostile are quite different from those that relate to whether the employer should have known about sexual harassment in the workplace. Petitioner's second proposition invites the Court to conflate the two inquiries and thus to repeat the error of the district court. As the court of appeals correctly held, that approach should be rejected.

Finally, petitioner would have this Court establish a per se rule that an employer's failure effectively to disseminate a sexual harassment policy means that the employer will be deemed to have constructive knowledge of whatever harassment may occur, regardless of the facts or circumstances involved. Title VII does not authorize such ad hoc judicial rulemaking, but, more important, the per se rule suggested by petitioner does not logically advance the antidiscrimination purposes of the statute. This is particularly apparent when it is recalled that the relevant events in this case occurred between 1985 and 1990, before the EEOC's own guidelines urged the dissemination of specific sexual harassment policies to employees. Petitioner's proposed rule is nothing more than a device for arbitrarily expanding employer liability. It should not be adopted.

ARGUMENT

Employers are not automatically or strictly liable for sexual harassment by their supervisors. This Court has so held. *Meritor*, 477 U.S. at 72. To distinguish between employers that are liable under Title VII and those that are not, "Congress wanted courts to look to agency principles for guidance . . . ." *Id.* Although announcing this holding in *Meritor*, the Court also cautioned that "such common-law principles may not be transferable in all their particulars to Title VII . . . ." *Id.*

Under agency principles, an employer may be held liable for its *own* wrongs that result in harm to an employee through the acts of a supervisor. Specifically, an employer that authorizes or ratifies the sexually-harassing conduct of its supervisors, or that is negligent in relation to that conduct, can be held directly liable for its own acts or omissions.

In this case, there never has been a contention that the City authorized or ratified the sexually-harassing conduct of Terry and Silverman. In addition, both courts below found that the City did not know about Terry's and Silverman's conduct before Bender received Ewanchew's letter. Pet. App. 4a, 44a, 84a. Petitioner does not challenge this finding, and indeed has adopted it. Pet. 6. Accordingly, as the case comes to this Court, there is no issue of any direct involvement by the City in the wrongful conduct, nor is there any assertion that the City failed to react promptly and appropriately once informed of the harassment. Petitioner, in short, does not seek to impose Title VII liability on the basis of anything the City itself did or failed to do.

Instead, petitioner presents two different legal constructs by which she contends the City can be held liable under

Title VII. First, she argues for a form of vicarious liability, under which liability is imputed to the employer without fault, based on the acts of the supervisors. Second, she argues that, although the City did not know of Terry's and Silverman's wrongdoing, it should have known (or should be deemed to have known) on three separate grounds: the lifeguards' statements to Gordon,[8] the "pervasive" nature of the conduct found by the district court, and the ineffective dissemination of the City's sexual harassment policy to Marine Safety Section employees before 1990. Because the City should have known for one or more of these reasons, petitioner argues, the City should be held liable under Title VII for failing to stop the harassment prior to Ewanchew's complaint. As the court of appeals correctly held, both of petitioner's proposed routes to liability of the City are flawed. To demonstrate the errors in petitioner's position, we proceed as follows.

First, we address petitioner's vicarious liability argument. We show that the argument is, in reality if not in name, nothing more than an attempt to impose the same strict employer liability that this Court rejected in *Meritor*. We then explain why the vicarious liability advocated by petitioner is unsupported by either the "scope of employment" or the "apparent authority" line of cases decided under the common law of agency. Among other things, we observe that Faragher's effort to fit this case under the "apparent authority" rubric is the product of an unwarranted transfer to the present factual situation of Restatement language designed to describe and summar-

[8] As noted above, Faragher, in her petition for certiorari, explicitly adopted the finding of both courts below that the City did not know of Terry's and Silverman's misconduct prior to Ewanchew's letter of complaint. Now, however, Faragher says that, based on the lifeguards' statements to Gordon, the City had "actual knowledge" of the harassment. Pet. Br. 30-34. For the reasons set forth below, *see* pages 42-45, *infra*, petitioner's position is without merit, regardless of whether the statements to Gordon are characterized as a source of actual knowledge or constructive knowledge by the City.

ize common-law decisions arising from very different circumstances not applicable here. We also show that, even if the Court were to conclude, notwithstanding our argument, that some version of the "apparent authority" concept is relevant, petitioner still should not prevail, because neither Terry nor Silverman made any use of his supervisory authority to assist or facilitate his wrongful conduct.

Second, we examine common-law agency principles generally and conclude that, in the context of a hostile-environment sexual harassment case, employer liability under Title VII should arise only if it can be shown that the employer was reckless or negligent in allowing the misconduct to occur or to go uncorrected. We demonstrate that such a standard is not only the one properly derived from common-law agency decisions dealing with an agent's intentional torts but also the one that best reflects and implements the remedial purposes of Title VII.

Finally, we address petitioner's three proposed bases for finding that the City should have known, or should be deemed to have known, about Terry's and Silverman's misconduct. We show that none of petitioner's theories supports an inference of knowledge by the City sufficient to have imposed a duty to intervene before Ewanchew's letter to Bender.

I. UNDER COMMON-LAW AGENCY PRINCIPLES, THE CITY SHOULD NOT BE HELD VICARIOUSLY LIABLE IN THIS HOSTILE-ENVIRONMENT SEXUAL HARASSMENT CASE.

Although petitioner perfunctorily disclaims any intention to impose strict liability, Pet. Br. 21, petitioner's proposed basis for vicarious liability will result in de facto strict liability whenever a supervisor is the harasser. According to petitioner,

> [a]n employer is liable for the sexually hostile environment created by a supervisor under § 219(2)(d) of the Restatement, regardless of whether it knew or should have known of that behavior, if the super-

> visor was "aided in" perpetrating the harassment by the "existence" of the powers he possesses as a supervisor.

Pet. Br. 21 (footnotes omitted). Petitioner's own argument demonstrates why the test she advocates is tantamount to automatic liability: "In many cases, as here, the supervisor's powers over the terms and conditions of the victim's employment will facilitate that harassment because the victim reasonably believes that she is at risk of retaliation if she resists, objects to or complains about that harassment." *Id.* Because the relationship between a supervisor and a subordinate is by definition one in which the supervisor holds some job power over the subordinate, the inevitable result in these circumstances is that a victim always will have (or, at least, always will be able to claim that she has) the reasonable fear necessary to render an employer liable.

Indeed, petitioner explicitly sets forth what would be every plaintiff's argument if petitioner's rule were adopted:

> Supervisors typically exercise broad discretionary powers over their subordinates, determining many of the terms and conditions of their employment, including their raises and prospects for promotion and controlling or greatly influencing whether they are to be dismissed. Supervisors and subordinates alike understand full well that a subordinate who incurs the displeasure of her superior, even for entirely personal reasons, is likely to find her employment made unpleasant, if not terminated altogether.

Pet. Br. 24. According to petitioner, there is no requirement that the supervisor actually *use* his authority to effect or promote the harassment. As long as there is a "typical" supervisory relationship, the employer will be liable.[9]

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[9] The examples given by petitioner reinforce this conclusion: "In some cases, the supervisory power utilized may be the supervisor's ability to compel the subordinate to remain in his presence . . . ." Pet. Br. at 22 n.21; *see id.* at 26 n.30. A victim "who may need a future job reference from the employer in question may well refrain from complaining even just before or after she resigns, for fear that the supervisor in question would retaliate by giving her an adverse reference." *Id.* at 25 n.28. "The virtual nonexistence of cases in which subordinates sexually harass their supervisors reflects the fact that the actual or potential exercise of supervisory powers by the harassing supervisor often lies at the very heart of this misconduct." *Id.* at 26.

Petitioner's strict liability approach cannot be reconciled with *Meritor*. There the Court ruled that the court of appeals was wrong in holding an employer strictly liable for the hostile work environment created by a supervisor—a supervisor who, like Terry, was the head of a remote location. The Court further held that "Congress' decision to define 'employer' [in Title VII] to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some *limits* on the acts of employees for which employers under Title VII are to be held responsible."[10] 477 U.S. at 72 (emphasis added). Petitioner's test simply fails to limit liability in any meaningful way.[11] It also misapplies common-law agency principles, as we now show.

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[10] This observation was drawn from the brief of the Equal Employment Opportunity Commission ("EEOC"), which also remarked that Congress failed to use terms such as "subordinate" or "supervisory employee" when defining "employer" under Title VII. Brief for United States and EEOC as *Amici Curiae* in *Meritor* (No. 84-1979) at 22. As to the inclusion of the term "agent" in Title VII's definition of employer, the EEOC noted that under agency principles, "a person who is another's agent for some purposes does not therefore act as the other's agent for all purposes." *Id.*

[11] There is no support for petitioner's or the government's secondary argument that their tests do not create strict liability because employers may be able to prevail depending on their sexual harassment policies and complaint procedures. When the Court refused to impose strict liability on the bank in *Meritor*, it did so despite the fact that the bank did not have a policy that specifically addressed sexual harassment and that its grievance procedure was obviously deficient. 477 U.S. at 72-73. Thus, petitioner's test, which imposes strict liability and then offers a potential safe harbor, offers nothing that has not already been rejected by the Court in *Meritor*. It should be rejected again here.

The common law of agency recognizes that, in certain situations, a blameless employer may be held indirectly, or vicariously, liable for the intentional torts of its employees. The two well-recognized situations in which such vicarious liability may be imposed are when an agent commits a tortious act "within the scope of his employment," and when an agent commits a tort while acting with "apparent authority." [12] An act done "within the scope of employment" is one that was done with the intent of furthering the employer's business, even if the act itself was unauthorized or even prohibited by the employer. An act done with "apparent authority" occurs when the principal's conduct causes a third party reasonably to believe that the agent is acting within the scope of his employment and carrying out his normal duties—at least from the public's perspective—when in fact he is not. Neither of these species of vicarious liability supports petitioner's effort to impose liability on the City in this case.

A. The Conduct Allegedly Creating The Hostile-Environment Sexual Harassment Was Outside The Scope Of Terry's And Silverman's Employment.

When Terry and Silverman engaged in the inappropriate conduct at issue here, they were pursuing their own agendas and clearly acting outside the scope of their employment. Under well-established agency principles, their employer, the City, cannot be held vicariously liable for such conduct.

To determine whether agency law imposes liability in a particular setting, courts look to agency principles that have been developed for related kinds of conduct. *See, e.g., American Soc'y of Mechanical Eng'rs, Inc. v. Hydro-*

[12] The term *respondeat superior* ("let the master answer") frequently is used to describe the vicarious liability of an employer for torts of its employees committed "within the scope of employment." *See, e.g., Konradi v. United States*, 919 F.2d 1207, 1210 (7th Cir. 1990). Other sources define the term more broadly, using it generally to describe any kind of vicarious liability of an employer for the torts of its employees. *See, e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 69, at 499 (5th ed. 1984).

level Corp., 456 U.S. 556, 568 (1982). Thus, a proper application of agency principles to Title VII hostile-environment sexual harassment should look to the common-law treatment of intentional or "wanton" torts, particularly those that involve unwelcome touching or verbal abuse of a sexual nature.

Under common-law agency principles, an employer is held vicariously liable for an intentional, wanton tort of its employee only if the tort was committed "within the scope of employment." The traditional "scope of employment" test looks not to whether the act is done during work time, but to whether the conduct is an extension of, or incident to, the employee's regular work and whether it was done to further the employer's interest.[13] *See, e.g., Stafford v. Postal Tel. & Cable Co.*, 198 S.E. 117, 120 (Ga. App. 1938); *see also* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 70, at 502 (5th ed. 1984) (scope of employment "refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment"); Restatement (Second) of Agency § 235 ("An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.").[14] If an employee adopts

[13] Although the majority of pre-Title VII decisions analyzing the propriety of vicarious liability for intentional, wanton torts applied the "scope of employment" test described in the text, a notable minority simply ruled that such torts fall outside the scope of employment as a matter of law. *See Hyde v. Baggett Trans. Co.*, 236 F. Supp. 194, 195 (E.D. Tenn. 1964); *Digsby v. Carroll Baking Co.*, 47 S.E.2d 203, 205 (Ga. App. 1948), and cases cited therein.

[14] *See also* Warren A. Seavey & Livingston Hall, *Cases on the Law of Agency* 39 (1956) (stating that there is no reason to hold an innocent master liable for the tort of its servant if "[t]he employment furnished no motivation for the act"); *Alford v. Noonan*, 259 F.2d 113, 115 (2d Cir. 1958) (to hold the master liable,

methods that are not authorized—or that are even forbidden—by the employer, but is nevertheless carrying out duties specifically delegated by the employer, the conduct may be held to be within the scope of employment. *See, e.g., White Auto Stores, Inc. v. Reyes*, 223 F.2d 298, 302-03 (10th Cir. 1955); *Adams Express Co. v. Lansburgh & Bros.*, 262 F. 232, 233-34 (D.C. Cir. 1920). Conversely, conduct is outside the scope of employment when it bears no relationship to work that the offending employee was hired to perform.[15]

Decisions involving common-law claims for sexually-harassing conduct comparable to what is now denominated hostile-environment sexual harassment held such conduct to be outside the scope of employment and, thus, declined to impose vicarious liability on the employer. *See, e.g., Western Union Tel. Co. v. Hill*, 67 F.2d 487 (5th Cir. 1933) (shop manager acted outside the scope of his employment, and employer could not be held liable, when the manager expressed to a customer his desire to "love and pet" her); *Houston v. Oppenheim*, 145 So. 339, 340 (Miss. 1933) (store owners not liable when their general manager made an improper proposal to an employee saleswoman because the manager "had turned aside from his master's business" to "engage in a frolic of his own").[16]

"it must appear that the act complained of was done to carry out the directions of the master, express or implied, and not to effect some purpose of the servant alone") (citation omitted) (applying Vermont law).

[15] A comparable standard was applied by this Court for assessing vicarious liability for willful torts under the Federal Employers' Liability Act. *See Davis v. Green*, 260 U.S. 349, 351 (1922) (holding railroad company not liable for a wanton killing by an engineer, absent proof that the killing was "done to further the master's business" and was more than just "a wanton and wilful act done to satisfy the temper or spite of the engineer").

[16] *See also Chaney v. Frigidaire Corp.*, 31 F.2d 977 (5th Cir. 1929) (employer not vicariously liable for actions of salesman who assaulted and forcibly held a customer in his car); *Fleming v. Bronfin*, 80 A.2d 915 (D.C. 1951) (affirming directed verdict for the employer on plaintiff's vicarious liability claims premised on

Pre-Title VII common-law agency decisions occasionally found certain specific examples of harassing conduct of a sexual nature to be within the scope of employment, thus leading to vicarious liability for the employer. In such cases, however, liability was premised on the fact that the improper sexual conduct was linked to the employee's business duties. *See, e.g., Digsby*, 47 S.E.2d at 203, 208 (employer held vicariously liable for acts of employee bill-collector who, in an effort to collect a debt, threatened a woman that he would "take it [the overdue bill] out in trade"); *Singer Sewing Mach. Co. v. Stockton*, 157 So. 366, 367 (Miss. 1934) (employer vicariously liable for acts of its salesman who made suggestive sexual remarks to a female customer because "his attempt to cultivate relations and make engagements with her seem[ed] to have been largely for the purpose of effecting a sale"). The principle of agency law that developed in these and other cases does not fit hostile-environment sexual harassment, in which a supervisor's conduct is almost invariably unrelated to his assigned duties.[17] At most, these cases suggest a possible basis for vicarious liability in cases of *quid pro quo* sexual harassment, in which a supervisor's harassment is directly linked with the supervisor's performance of his assigned duties, in the sense that the supervisor "conditions a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of

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employee's indecent touching of a customer); *Hoppe v. Deese*, 61 S.E.2d 903 (N.C. 1950) (telephone company employee acted outside the scope of his employment when he assaulted a female customer by lifting her onto a bed, and plaintiff had no cause of action under a *respondeat superior* theory against the employer for the lascivious conduct of its employee); *Rohrmoser v. Household Fin. Corp.*, 86 S.W.2d 103 (Mo. App. 1935) (verdict properly directed for employer when employee grabbed plaintiff and tore her dress).

[17] There could be some hypothetical fact situation that could bring a hostile-environment claim within the scope of employment. *See, e.g., Stafford v. Missouri*, 835 F. Supp. 1136, 1150-51 (W.D. Mo. 1993) (employer liable for supervisor's harassment of employee because harassment was motivated by a desire to serve employer).

sexual conduct." *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994).[18]

This case exemplifies hostile-environment conduct that is outside the scope of the harassers' employment. The instances of unwelcome touching and inappropriate language had nothing to do with Terry's and Silverman's jobs. They were pursuing their personal agendas when they engaged in the inappropriate conduct. There is simply no testimony that any of the conduct was done in furtherance of the job, nor is there any evidence that the kind of conduct at issue somehow could have been viewed as helpful to the City or as one way of promoting the City's interests.[19]

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[18] Because this is not a *quid pro quo* case, we do not attempt to describe the proper metes and bounds of employer liability in such circumstances. *See, e.g., Jansen v. Packaging Corp.*, 123 F.3d 490 (7th Cir. 1997) (en banc), *cert. granted sub nom. Burlington Indus., Inc. v. Ellerth*, No. 97-569 (Jan. 23, 1998); *see also, e.g.*, Stacey Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 Tex. L. Rev. 435 (1997) (arguing that a negligence standard should apply in *quid pro quo* cases).

[19] Most post-*Meritor* Title VII decisions recognize that hostile-environment sexual harassment is generally outside the scope of employment. *See, e.g., Torres v. Pisano*, 116 F.3d 625, 634 n.10 (2d Cir.) (recognizing that liability rarely will attach under scope of employment test), *cert. denied*, 118 S. Ct. 563 (1997); *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) ("illegal sexual harassment is an illegitimate corporate activity, beyond the scope of supervisors' employment"); *Gary v. Long*, 59 F.3d 1391, 1397-98 (D.C. Cir.) (assuming that hostile-environment harassment is outside the scope of employment), *cert. denied*, 116 S. Ct. 569 (1995); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 107 (3d Cir. 1994) (absent use of actual authority, hostile-environment harassment is outside the scope of employment); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987) ("[s]exual harassment simply is not within the job description of any supervisor or any other worker in any reputable business"); *but see Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 182-84 (6th Cir.) (harassment may be within the scope of employment), *cert. denied*, 506 U.S. 1041 (1992).

Petitioner appears to have conceded that the City cannot be held vicariously liable on the theory that Terry and Silverman acted within the scope of their employment. Although petitioner states in passing in a footnote that "[l]iability can also be found . . . in cases in which a supervisor effectuates the offending behavior 'within the scope of employment,'" Pet. Br. 21 n.17, she does not argue that the sexual harassment at issue here was within the scope of employment, nor does she contest the court of appeals' holding that these activities were outside the scope of employment. Pet. App. 10a-12a.

B. The Common-Law Concept Of Apparent Authority Does Not Apply To Hostile-Environment Sexual Harassment Cases.

The common-law agency concept of "apparent authority" has no application to sexual harassment cases based on hostile work environment. That conclusion follows from the very nature of apparent authority as a basis for vicarious liability.

The crux of apparent authority, as its name implies, is that the agent *appears* to be authorized to take certain actions that in fact he is not authorized to take. Apparent authority is a specialized branch of vicarious liability developed to deal with tortious conduct that does not appear tortious on its face. The tortious nature of the conduct is disguised because the agent appears to be carrying out his duties and acting within the scope of his employment, and the victim of the conduct has no reason to question the legitimacy or propriety of the agent's action.[20]

Apparent authority cases typically involve misrepresentation or deceit by an agent who takes advantage of

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[20] Comments to the Restatement's apparent authority sections cite some of the classic examples of tortious conduct that otherwise appears normal on its face: where a telegraph operator sends false messages purporting to come from a third person, § 219, comment e; where a designated company spokesman makes incorrect statements, § 247, comment c; and where a warehouse employee issues false receipts to customers, § 261, comment b.

his position to commit the tort. *See* Warren A. Seavey, *Handbook of the Law of Agency* 162 (1964). In such cases, at least from the third-party victim's perspective, the agent is engaged in a normal business activity. As this Court has explained:

> Under an apparent authority theory, liability is based upon the fact that the agent's position facilitates the consummation of fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.

American Soc'y of Mechanical Eng'rs, 456 U.S. at 566 (*quoting* Restatement (Second) of Agency § 261, comment a, at 571) (internal quotations omitted).

A principal can be held vicariously liable in an apparent authority case if (but only if) the principal has contributed to the appearance of authority by taking some action to convey to third parties that the agent is acting on behalf of the principal. In other words, for liability to attach, a principal must have done something to give the victim a reasonable belief that the agent had authority to engage in the particular conduct at issue. *See, e.g., Simpson v. Compagnie Nationale Air France*, 248 N.E.2d 117, 120 (Ill. 1969) ("The theory of apparent authority rests on two premises: a manifestation by the principal to a third party, and belief by that third party that the extent of the authority granted to the agent encompasses the contemplated activity."); *see also* Restatement (Second) of Agency § 27.

Given the nature of apparent authority and the circumstances in which the concept has been applied at common law, it is plain that the concept cannot be used as a basis for vicarious liability of the employer in a hostile-environment sexual harassment case like this one. No reasonable employee in such a case could believe that her harasser has been authorized to engage in the offending conduct. The employer has not communicated the existence of any such authorization,[21] and there is no other basis on which the victim could conclude that the wrongdoing appears to have been authorized.

It is improper, therefore, to extend the "apparent authority" rationale into the realm of intentional torts like sexual harassment. Such wrongs diverge obviously from expected or desired standards of conduct, and the victim has reason to know that the conduct is not "regular on its face."[22] That is why pre-Title VII cases dealing with intentional, wanton torts of a sexually harassing nature describe the test for vicarious liability *solely* in terms of whether the conduct was within the scope of employment and not whether there was apparent authority. The com-

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[21] An employer could be deemed vicariously liable only if and when it did something to give the victim a reasonable belief that the supervisor actually had authority from the employer to sexually harass its employees. *See, e.g., Barnes v. Costle*, 561 F.2d 983, 996 (D.C. Cir. 1977) (apparent authority principles inapplicable because employee could not reasonably believe that authority for the supervisor's harassment derived from the employer); *see also Jansen*, 123 F.3d at 548 (Coffey, J., concurring and dissenting) ("[I]n the sexual harassment context, the principal's actions must have given the victim a reasonable belief that the perpetrator of the harassment had authority to harass. For this reason, apparent authority seems an unlikely basis for employer sexual harassment liability.") (*quoting* Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 Vand. L. Rev. 1229, 1247-48 (1991)).

[22] *See, e.g., In re Atlantic Fin. Management, Inc.*, 784 F.2d 29, 32 (1st Cir. 1986) (noting that the apparent authority doctrine applies in "misrepresentation" cases), *cert. denied*, 481 U.S. 1072 (1987); *Fields v. Horizon House, Inc.*, No. 86-4343, 1987 U.S. Dist. LEXIS 11315, at *14 (E.D. Pa. Dec. 9, 1987) (apparent authority is unlikely when the agent's conduct is unusual); *Bozarth v. Harper Creek Bd. of Educ.*, 288 N.W.2d 424, 425-26 (Mich. App. 1979) (apparent authority liability is "limited to situations where, from the viewpoint of the person being harmed, the agent appears to have been acting within the scope of his employment"); W.W. Allen, Annotation, *Doctrine of Apparent Authority as Applicable Where Relationship Is That of Master and Servant*, 2 A.L.R.2d 406, 409 (1948) ("[i]n the ordinary tort case it is unquestionably absurd to think of applying a doctrine of apparent authority").

mon-law agency principle of "apparent authority" was not meant to apply to evident intentional torts that are unrelated to the agent's responsibilities,[23] and it should not now be utilized for a purpose that was never intended.

In this case, the district court expressly found that "during the time of Faragher's tenure with the City, from 1985 to 1990, a reasonable person would have known that sexual harassment violates clearly established law." Pet. App. 98a. As a result, any liability theory premised on "apparent authority" to sexually harass is deficient from the outset.

Nonetheless, petitioner relies heavily on Section 219 (2)(d) of the Restatement, closely parsing the Reporter's language in an effort to support liability against the City. Petitioner disregards the fact that this Restatement provision was intended to describe and summarize the apparent authority case law. The Restatement does not exist in a vacuum, and its provisions do not have an independent life of their own, divorced from the common-law authorities from which they are derived.

Section 219(2)(d) provides that an employer may be liable for the tort of its servant if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency

[23] In *American Society of Mechanical Engineers*, the Court took note of the dissent's argument that principals generally were not held liable for intentional torts of their agents under agency law of the late 19th century. 456 U.S. at 568 n.6. In holding that liability nevertheless could be premised on a theory of apparent authority in that case, the Court looked to cases involving "analogous" torts. *Id.* (listing fraud cases). In particular, the Court quoted one Minnesota decision that "summarized the reasoning" of 19th century apparent authority cases: "Persons receiving dispatches in the usual course of business, *where there is nothing to excite suspicion*, are entitled to rely upon the presumption that the agents . . . have faithfully and honestly discharged the duty owed . . . ." *Id.* (*quoting McCord v. Western Union Tel. Co.*, 39 N.W. 315 (Minn. 1888)) (emphasis added).

relation." Petitioner's reliance on this text ignores the common-law principles that underlie it and give it meaning. It invites error to pluck a sentence fragment from the Restatement and apply it as if it were a statute, separate and apart from the legal background that the statement is intended to synthesize.[24] An analysis of the origins —and recognized limitations—of the "apparent authority" doctrine demonstrates its inapplicability to conduct such as sexual harassment.

[24] Petitioner engages in just this kind of cherry-picking. She cites only the second clause of Section 219(2)(d), which states that an employer is subject to liability for a servant's tort when the servant "was aided in accomplishing the tort by the existence of the agency relation," and argues that this clause results in a rule that an employer is responsible for hostile-environment sexual harassment whenever a supervisor is "aided in" perpetrating harassment by his supervisory authority. Pet. Br. 21. In fact, the second clause of Section 219(2)(d) leads to employer liability in only "narrow factual circumstances." *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1029 (7th Cir. 1997). The second clause is simply a refinement of the "apparent authority" doctrine articulated in the first clause of Section 219(2)(d), which, as addressed more fully in the text above, is a theory of liability primarily applicable to tortious acts that appear normal on their face—generally torts of misrepresentation. As the Seventh Circuit recently observed:

> The [Restatement] commentary illustrates liability under the second clause of § 219(2)(d) with two narrow examples: a telegraph operator sending false telegraph messages, or a store manager cheating customers at the store. As the D.C. Circuit recognized, in such cases, liability is based upon the fact that the agent's position facilitates the consummation of the tort, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.

Smith, 128 F.3d at 1029 (*quoting Gary*, 59 F.3d at 1397) (internal quotations omitted); *see also* Phillips, *Employer Sexual Harassment Liability*, 44 Vand. L. Rev. at 1249-50. The second clause of Section 219(2)(d) does not support the expansive interpretation that petitioner gives it. Rather, it should be read as a narrow "apparent authority"-based exception to the normal rule that employers are not vicariously liable for torts outside the scope of employment.

C. Even Under An "Apparent Authority" Test Based On The Use Of Supervisory Authority, The City Is Not Liable For The Conduct Of Its Supervisors In This Case.

Even though the concept of "apparent authority" properly does not apply to hostile-environment sexual harassment, some courts of appeals have determined whether or not an employer is liable in such cases by applying one or another version of a test based on the Restatement's apparent authority section, Section 219(2)(d).[25] *See, e.g., Torres*, 116 F.3d at 635; *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *pet. for cert. filed*, No. 97-232 (Aug. 6, 1997).

Even under the approach adopted by these courts, however, the City would not be liable in this case. That is

[25] At least six circuits recognize that liability in a hostile-environment sexual harassment case should attach to the employer only based on the employer's negligence and not on any "apparent authority" theory. *See, e.g., Jansen*, 123 F.3d at 495 (7th Cir.) (en banc) (per curiam) ("the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability"); *Davis v. City of Sioux City*, 115 F.3d 1365, 1368 (8th Cir. 1997) ("[i]n our circuit, we have applied the knew or should have known standard to supervisor-induced hostile environment sexual harassment claims"); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 807 (5th Cir. 1996) (stating that an employer is only liable for hostile-environment harassment by a supervisor "if it knew or should have known of the employee's offensive conduct and failed to take steps to repudiate that conduct"); *Andrade*, 88 F.3d at 261 (4th Cir.) ("an employer is liable for a sexually hostile work environment created by a supervisor or other employee only if the employer knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action"); *Nichols*, 42 F.3d at 508 (9th Cir.) ("The proper analysis for employer liability in hostile environment cases is what management-level employees knew or should have known."); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988) (applying *Meritor* in Title IX context, "educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it").

because the cases relying on Section 219(2)(d) require proof that the harassment was carried out through some active abuse of the agent's supervisory authority. The harasser is said to be "aided" under Section 219(2)(d) only when he affirmatively capitalizes on his supervisory status.[26] Evidence of such active use of supervisory authority is altogether lacking here. Instead, petitioner attempts to rely on the mere *existence* of supervisory authority and the resulting proximity of harasser and victim as a basis for arguing that the harasser was "aided" by the agency relation. This far broader test, the effective equivalent of strict liability, is not supported by the cases that have employed an "apparent authority" test based on Section 219(2)(d). *See, e.g., Harrison*, 112 F.3d at 1446 ("liability [does not] attach where the harasser's agency relationship merely provided him with proximity to plaintiff").

As the en banc court below recognized, "[i]n one sense, a supervisor is always aided in accomplishing hostile environment sexual harassment by the existence of an agency relationship with his employer because his responsibilities include close proximity to and regular contact with the victim." Pet. App. 12a (*citing Gary*, 59 F.3d at 1397).[27] As the court of appeals also observed, however, "[t]he common law rule does not use 'aided' in such a broad sense." Pet. App. 13a; *see also* Phillips, *Employer Sexual Harassment Liability*, 44 Vand. L. Rev. at 1249.

[26] *See, e.g., Torres*, 116 F.3d at 635 ("to establish liability on the theory that the supervisor exploited the agency relationship in committing the harassment, a plaintiff 'must allege facts which establish a nexus between the supervisory authority' and the harassment") (*quoting Tomka v. Seiler Corp.*, 66 F.3d 1295, 1306 (2d Cir. 1995)); *Karibian v. Columbia Univ.*, 14 F.3d 773, 780-81 (2d Cir.) (harasser must "use his actual or apparent authority to further the harassment alleged"), *cert. denied*, 512 U.S. 1213 (1994).

[27] *See also Karibian*, 14 F.3d at 780 ("where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetuated by the plaintiff's co-workers").

Petitioner's formulation, which stresses the victim's fear of retaliation based on the supervisory status of the harasser, fails for the same reason that courts have rejected "mere proximity" as a basis for vicarious liability in hostile-environment sexual harassment cases. As the Second Circuit explained in *Torres* when it refused to find employer liability based on "mere proximity" or "fear of retaliation,"

> It is likewise the case that the supervisor is always aided by the employment relationship because the employee will fear the repercussions that might result from her complaining or resisting. But this exception too, if applied in the absence of specific evidence that the supervisor used his authority to place the employee in a position in which she felt that she could not complain without facing adverse consequences, would swallow the rule . . . .

116 F.3d at 635.

To the extent that Section 219(2)(d) has any proper application at all in hostile-environment sexual harassment cases, the court of appeals correctly limited it to situations in which "the harassment is accomplished by an instrumentality of the agency or through conduct associated with the agency status." Pet. App. 13a. In this case, petitioner seeks to impose liability on the City solely on the ground that Terry and Silverman were supervisors. This is inadequate. The facts establish, as the court of appeals held, that "neither Terry nor Silverman was aided in accomplishing the harassment by the existence of his agency relationship with the City." Pet. App. 12a. They could have engaged in the same conduct as co-workers:

> No person threatened to fire or demote Faragher for refusing to accommodate Terry's and Silverman's harassing overtures. Moreover, the harassment cannot reasonably be viewed as conduct associated with Terry's and Silverman's status as agents of the City. . . . And, there is no evidence that either Terry or Silverman made any employment decisions based upon Faragher's response to their sexual overtures.

Id. at 13a (citation omitted). Under the formulation of the "apparent authority" test adopted in such decisions as *Torres* and *Harrison*, the evidence in this case is insufficient to impose vicarious liability on the City.[28]

II. UNDER COMMON-LAW AGENCY PRINCIPLES, AN EMPLOYER THAT IS NEGLIGENT OR RECKLESS MAY BE HELD DIRECTLY LIABLE FOR HOSTILE-ENVIRONMENT SEXUAL HARASSMENT.

Although agency principles ordinarily do not render an employer vicariously liable for hostile-environment sexual harassment committed by its supervisors, an employer

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[28] Petitioner's references to Terry having obtained an unsigned resignation letter or having the power "to banish complainants to undesirable towers or unwanted shifts," Pet. Br. 29, have nothing to do with the alleged sexual harassment. There was no evidence suggesting that Terry or Silverman used such hypothetical powers in connection with their sexually-harassing conduct. Likewise, there was no evidence at trial, and the district court did not find, that "Terry's ability to visit revenge upon any who crossed him was legendary." Pet. Br. 30. There was also no evidence, and the district court did not find, that "sexual harassment was the rule, not the exception" or that "[t]he atmosphere was one of unbridled licentiousness and petty, workaday tyranny." *Id.* Indeed, the evidence, as recognized by the trial court, demonstrated that sexual harassment was the *exception* and not the rule. *See, e.g.*, J.A. 193 (Faragher: "[f]or the most part, I enjo[y]ed my job on the beach"); J.A. 133, 135 (Harrington enjoyed her five years working for the City at the beach and, from what she could see, Faragher and Ewanchew enjoyed their work); J.A. 260 (Evans: atmosphere in locker room was "friendly" and joking was not offensive). Indeed, the evidence demonstrates that, apart from the rather infrequent incidents described above, *see* pages 5-7, *supra*, petitioner spent most of her five years actually on the beach, performing her job as a lifeguard, and free from any unwelcome conduct (or indeed any conduct at all) by Terry or Silverman. *See, e.g.*, J.A. 123-24 (Ewanchew testifying that bulk of work day was spent on the beach without contact with Terry); Trial Testimony, June 22, 1994, 225 (Faragher stating that she generally found the beach a good place to work). Petitioner's unacceptable poetic license with the facts is no substitute for the nonexistent record evidence that Terry or Silverman ever used his supervisory authority to facilitate his inappropriate conduct.

properly may be held directly liable for its own negligence in relation to such conduct. This principle fairly imposes liability when the employer is culpable. It also properly reflects and implements the public policy underlying Title VII.

In pre-Title VII common-law agency decisions dealing with intentional, wanton torts, courts generally recognized that an employer could be held liable on theories of negligent hiring or negligent retention of the tortfeasor, notwithstanding the inapplicability of vicarious liability.[20] *See, e.g., Fleming v. Bronfin*, 80 A.2d 915, 917 (D.C. 1951) (affirming trial court's dismissal of claim resting on assertion that assault was within the scope of employment, but reversing directed verdict on negligent hiring and retention claims). Under a negligence standard, an employer would be liable when it had actual or constructive knowledge of wrongdoing but failed to take appropriate remedial action.

Even apart from the common-law precedents, the kind of harassment at issue also supports a negligence standard as the appropriate test for employer liability in Title VII hostile-environment cases. Hostile-environment sexual harassment can arise from conduct that the harasser perceives to be merely flirtatious (as opposed to disparaging or persecuting). Reactions to certain conduct of a sexual nature can differ significantly depending on the perspective of the actor or the recipient. As the EEOC observed in its brief to the Court in *Meritor*, "sexual advances and innuendo are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous." Brief for United States and EEOC as *Amici Curiae* in *Meritor* (No. 84-1979) at 13. Indeed, courts have even strug-

[20] A few courts held that employers could not be held liable even on negligence grounds for willful torts deemed to be outside the scope of employment. *See, e.g., Burgert v. Union Pac. R.R. Co.*, 240 F.2d 207 (8th Cir. 1957) (applying Kansas law); *Gens v. Wagner Elec. Mfg. Co.*, 31 S.W.2d 785 (Mo. 1930).

gled in defining the phrase "hostile work environment" for the purpose of identifying actionable sexual harassment, and societal views differ as to what constitutes abusiveness. *See Jansen*, 123 F.3d at 501 (Flaum, J., concurring).

The employer's capacity to prevent or eradicate hostile-environment sexual harassment is limited by the vagueness of its contours.[30] The definitional complexities associated with hostile-environment harassment make it difficult for employers to communicate to their employees a consistent, unambiguous message about what conduct is prohibited. *Jansen*, 123 F.3d at 501 (Flaum, J., concurring). In such circumstances, a negligence standard—which "possesses the flexibility to respond by degree to amorphous or variable harms"—is appropriate. *Id.* at 502.

This case illustrates the need for a flexible negligence standard. The environment in which the misconduct occurred was not a conservative milieu—it was not a bank or a library. Instead, it was a beach staffed by young lifeguards who created a "boisterous" and "rambunctious[]" atmosphere in which it was not uncommon for both men and women to engage in conversations that had sexual undertones. Pet. App. 72a; J.A. 122; 152-54; 193-96; 235-36; 244-45; 259-60. When they were together, the lifeguards were in a one-room, cramped headquarters in which men and women shared locker and shower facilities.[31] As the court of appeals concluded in rejecting

[30] One particularly striking definitional dilemma in delineating improper workplace sexual advances is the fact that "it is the abuse of the practice, rather than the practice itself," that gives rise to a Title VII claim. *Barnes*, 561 F.2d at 1001 (MacKinnon, J., concurring). Sexual advances are not "intrinsically offensive," in the way that other forms of discrimination prohibited by Title VII are. *Id.*; *see also* Brief for United States and EEOC as *Amici Curiae* in *Meritor* (No. 84-1979) at 13 ("racial slurs are intrinsically offensive and presumptively unwelcome").

[31] The lifeguards were stationed in a remote location making it more difficult for the City to become aware of any potential problems. *See, e.g., Kotcher v. Rosa & Sullivan Appliance Ctr.*, 957 F.2d

common-law claims of negligence against the City, there was no basis to conclude that the City should have known that on a number of occasions spread over the course of several years the conduct of two supervisory employees crossed the line or was deemed unwanted by some number of lifeguards.[22] A flexible negligence standard that takes into account the context, conduct, frequency, and environment is the most appropriate way to determine an employer's notice and liability for the acts of its supervisors.

A negligence standard also comports with the remedial goals of Title VII. Title VII's goal of guaranteeing equal employment opportunities for both men and women "dictates that deterrence be the foremost objective." *Jansen*, 123 F.3d at 495 (Flaum, J., concurring). Under a negligence standard, employers have a strong incentive to take prompt remedial action whenever notified of harassment, and the constructive notice prong of the negligence test encourages employers to take reasonable steps to prevent harassment. By contrast, under a strict liability regime, a victim of harassment may be tempted to defer notice to the employer until she is certain a hostile environment

59, 64 (2d Cir. 1992) (Rochester-based employer not liable for the harassing acts of the supervisor in charge of store at remote Oswego location); *Torres*, 116 F.3d at 634 n.12 (harassment perpetrated by the highest-ranking official at a "remote" Dental Center owned by New York University would not automatically cause NYU to be held liable).

[22] Indeed, Ewanchew testified that the lifeguards, both men and women, used sexual terms in a joking or light way that she did not find offensive. J.A. 121-22. She participated with Gordon in conversations involving sexual joking, and she did not object to them. J.A. 122-23; *see also* Trial Testimony, June 22, 1994, 95-96, 98. It is difficult to say whether or when such conversations created a hostile environment. *See* J.A. 152-53 (Gordon: "we all used inappropriate language from time to time," as well as teasing language with sexual overtones; it was hard to know when the line was crossed). Gordon also testified that the lifeguards engaged in "familial touches, putting arms around shoulders, pats on the back" and "an occasional pat on the fanny" that were not offensive. J.A. 153-54.

has been established and her claim perfected. The goals of Title VII are not advanced by tests that may inhibit communication or by a rule that may cause employers to regard remedial action as a concession of liability.

The frequently subjective character of hostile-environment harassment leads to "the infeasibility of an employer's stamping out this sort of harassment without going to extreme expense and greatly curtailing the privacy of its employees, as by putting them under continuous video surveillance." *Jansen*, 123 F.3d at 511 (Posner, C.J., concurring and dissenting). Strict liability that is imposed when no reasonable measures could have prevented the harassment will have no deterrent effect and will only serve to impose extra costs on employers—much of which ultimately will be shifted to the public. *Id.* Moreover, the typical cost-shifting rationale used to justify strict liability in other settings (*e.g.*, in products liability, where manufacturers are presumed responsible for harm caused by defective products) "does *not* justify making employers 'strictly liable' for the seemingly intractable *social* problem of sexual harassment." *Jansen*, 123 F.3d at 522 (Coffey, J., concurring and dissenting) (emphasis in original).

Finally, any test other than negligence also raises potential privacy and freedom of speech problems. As an alternative to strict liability, petitioner proposes that an employer be permitted to escape such liability by proving the efficacy of its anti-harassment program. Pet. Br. 22. In this scenario, employers would have an incentive to trumpet the corrective actions they took with regard to any sexually-suggestive speech or conduct in the workplace—regardless of any privacy concerns on the part of the people involved or whether the speech or conduct actually created a hostile environment. Anything less would imperil the employer's proof that its policy is rigorous and accessible. Moreover, employers would have an incentive to restrict *any* complained-of, sexually-suggestive speech, whether or not it created a hostile environment under the law—a result that raises serious First Amendment implications for public employers such as the City. *See, e.g.*,

Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 Nw. U. L. Rev. 1009 (1996) (citing Jennifer Goode, *It's Art vs. Sexual Harassment*, The Tennessean (Nashville), Mar. 1, 1996, at 1A (reporting a city attorney's explanation for the removal of a painting from city hall, after a complaint of sexual harassment: "I feel more comfortable siding with protecting the rights under the Title VII sexual harassment statutes than I do under the First Amendment.")).

Finally, the constructive knowledge prong of the negligence standard allows necessary flexibility to take into account the time frame or social climate within which the prohibited conduct occurred. In the case of sexual harassment, it is clear that there now exists in this country a mature public policy against workplace sexual harassment. But that is relatively recent:

> The public policy against sexual harassment in the workplace is a relatively recent development. The term "sexual harassment" was unknown before the mid-1970s, and during that decade many courts did not recognize it as an actionable form of sex discrimination. An important turning point was the issuance of new [sexual harassment] regulations by the EEOC in 1981 . . . . However, even in the mid-1980s, many courts continued to accept sexual harassment of women employees as an unobjectionable and unavoidable aspect of the workplace. The existence of a "well-defined and dominant" public policy against workplace sexual harassment was still in dispute.

Jeffrey Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 Harv. Women's L.J. 17, 28-29 (1994) (citations omitted); *see also Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1179 (2d Cir. 1996) (noting that "[i]t cannot be denied that we live in a time of significant cultural change, in which varieties of coarse conduct once taken for granted in the American workplace appear to be subject to punishment under the law" and taking judicial notice that in mid-1991 "the popular press devoted a vast amount of

attention to the issue of sexual harassment"). The growth in public awareness of sexual harassment as an unlawful act is reflected in the very recent explosion of sexual harassment claims.[33] Given these considerations, the conduct that would come to a reasonable employer's notice in 1998 is likely to be considerably more encompassing than the conduct that would have come to a reasonable employer's notice in 1985 or 1990.

III. NONE OF PETITIONER'S PER SE RULES PROPERLY IMPUTES KNOWLEDGE OF TERRY'S AND SILVERMAN'S CONDUCT TO THE CITY.

Without automatic liability, petitioner is forced to rely on several ad hoc attempts to saddle the City with actual or constructive knowledge of Terry's and Silverman's conduct.[34] In particular, petitioner argues for a per se rule that actual notice to any employee in any supervisory role constitutes actual notice to the employer, regardless of what level of authority the supervisor may occupy and in what capacity and under what conditions he may have learned of the alleged harassment. Second, petitioner asserts that the court of appeals erred in holding as a matter of law that, on this record, the "pervasiveness" that created a hostile work environment for Faragher did not give the City constructive knowledge of the harassment. Finally, petitioner urges a rule that an employer's failure

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[33] One estimate indicates, for example, that sexual harassment charges increased 69%—from 3,329 to 5,629—between 1991 and 1992. *More Disability Charges Have Been Filed Than EEOC Estimated*, Daily Lab. Rep. (BNA) No. 15, at A-4 (Jan. 26, 1993). By comparison, according to one of petitioner's *amici*, the EEOC received 15,889 sexual harassment complaints in fiscal year 1997. Brief *Amicus Curiae* of National Women's Law Center at 21-22.

[34] Petitioner concedes that the City cannot be charged with actual knowledge of the harassment by attributing to the City the knowledge of Terry and Silverman, the harassers. Pet. Br. 32 n.39. Given this concession and the character of the supervisory positions occupied by Terry and Silverman, there is no need to address whether there are occasions when actions of supervisor-harassers can be imputed directly to employers.

to disseminate effectively a sexual harassment policy between 1985 and 1990 saddles the employer with constructive knowledge of whatever harassment may have occurred, regardless of the facts or circumstances involved. None of these makeshift rules is consistent with common-law agency principles, Title VII, or sound policy.

A. Gordon's Knowledge Cannot Be Imputed To The City.

The court of appeals correctly held that Faragher's complaints to Gordon did not provide a basis for holding the City directly liable, because Gordon did not occupy a higher management position and, in any event, he received the complaints not in his capacity as an agent of the City but as a friend of Faragher and other lifeguards.[35] Pet. App. 15a & n.9. Under a negligence standard, knowledge gained by an employee should be imputed to an employer only when it "has a reasonable chance of being able to respond to the information." *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997). Given the variations in the hierarchical systems of different organizations—as well as the myriad possible variations between the levels of harasser, victim, and confidant—a flexible standard that looks to the employer's "reasonable chance" of learning about the harassment is appropriate. In this case, the City did not have a reasonable chance to learn of the harassment through conversations with Gordon, and the court of appeals correctly ruled that notice should not be imputed to the City in these circumstances.[36]

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[35] It is not clear from the record when Faragher complained to Gordon. It is possible that such complaints were made only after Ewanchew sent her letter to Bender. *See, e.g.*, Trial Testimony, June 22, 1994, 5-6 (Gordon does not know what year Faragher complained); *id.* at 213-14 (Faragher remembers complaining of incident in 1990). If that is the case, then as a factual matter Gordon did not have notice at a time that would have made any difference in the investigation of this matter.

[36] The district court found that Gordon's knowledge should not be imputed to the City because Gordon did not rank as higher management. Pet. App. 84a. It nonetheless held that Gordon's knowledge was one basis for imposing liability on the City, based solely on the conclusion that Gordon was an "agent" of the City. Pet. App. 92a-93a. In so concluding, the district court incorrectly fused vicarious liability and negligence principles.

Whether an enterprise has a reasonable chance of learning about harassment from a particular employee turns on "whether the information comes to the attention of someone who ought by specification of his duties, or failing that, general norms of management to do something about it." *Young*, 123 F.3d at 675. In particular, this inquiry looks to whether the victim complained to another employee who personally had authority to terminate the harassment or who reasonably could be expected to refer the matter to a higher-up who could act on the complaint. *Id.; see also Dickson v. Graham-Jones Paper Co.*, 84 So. 2d 309, 310 (Fla. 1955) (under agency principles, notice to an agent is notice to the principal only when the agent should be expected to communicate the information to the principal and the information that is given to the agent is within the scope of his authority and is communicated to the agent in his official capacity). This approach, which satisfies the reasonable expectations of both victim and employer, is far preferable to a standard that looks only to the confidant's level in the enterprise's hierarchy.

In this case, there are several reasons why Gordon's knowledge should not be imputed to the City. First, the information about the harassment was not communicated to Gordon in his official capacity, nor was it connected to his general responsibilities. As the district court held, "[t]he lifeguards talked to Gordon, not on a subordinate to superior basis, but because of the high repute in which he was held . . . ." Pet. App. 82a. This unchallenged finding makes clear that the comments to Gordon were not intended to be official complaints to a supervisor.

Moreover, there was no evidence that petitioner or any other lifeguard who may have talked to Gordon did so expecting Gordon to relate the discussions to a higher-up

or otherwise to do something about the situation. *See generally* J.A. 131 (Harrington states, "I don't remember complaining to [Gordon], no. I might have mentioned things that were said or happened, but I don't remember formally complaining to him."); J.A. 214 (Faragher states she "talked" to Gordon, in response to question whether she "complain[ed]" to anyone about an incident); J.A. 232, 234 (Nye states that conversations with Gordon were "[n]ot officially like at work. But probably off the job, yeah" and "[i]t wasn't really a complaint. It was more like a comment, I suppose").

As petitioner acknowledges, Gordon left the lifeguards with the clear impression that he would not communicate with the City about their troubles with Terry and Silverman. Gordon was quite blunt in indicating his intent to remain uninvolved; he told the lifeguards that there was "nothing he could do." Pet. Br. 12. In these circumstances, as a matter of law, the City was not on notice of Terry's and Silverman's misconduct by way of Gordon's conversations with Faragher and the other lifeguards. As this Court recognized in *Mutual Life Ins. Co. v. Hilton-Green*, 241 U.S. 613, 623-24 (1916), the general rule of imputing notice to a principal "does not apply when the third party knows there is no foundation for the ordinary presumption—when he is acquainted with circumstances plainly indicating that the agent will not advise his principal." *See also Graves v. Iowa Mut. Ins. Co.*, 132 So. 2d 393, 395 (Fla. 1961) ("[t]he rule that notice to an agent is notice to the principal does not apply when the circumstances are such as to raise a clear presumption that the agent will not transmit his knowledge to his principal").

Finally, the lifeguards knew that Gordon had no authority to terminate the conduct at issue. Gordon was Silverman's peer and then (after Silverman's promotion in 1989) his subordinate, and Gordon at all times worked under Terry, just as Faragher and the other complaining lifeguards did.[37] The simple fact that Gordon took his orders from Terry, and had no supervisory authority over him, demonstrates that notice to Gordon cannot be viewed as notice to the city.

B. The City Cannot Be Held Liable Based Solely On The District Court's Finding Of Pervasiveness Sufficient To Constitute A Hostile Work Environment.

Petitioner argues that the court of appeals erred in holding that the record does not support a finding that the City had constructive knowledge of the harassment. Petitioner is wrong. The court of appeals correctly held that the district court improperly conflated two separate inquiries—whether the complained-of conduct was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,'" *Meritor* at 67, and whether the City had constructive knowledge of that hostile work environment. The distinction is important. The former issue focuses on the victim's knowledge and how she views the work environment. The latter focuses on the totality of circumstances from the employer's perspective. A finding that a single employee reasonably perceived her working en-

[37] Gordon testified, "I didn't think it was my place to . . . discipline a supervisor . . . ." Trial Testimony, June 21, 1994, 158. In addition, Gordon acted like a peer when he attended a meeting at Ewanchew's house in 1990 at which the lifeguards and an attorney from the National Organization for Women discussed Terry's and Silverman's conduct and considered their options. *Id.* at 104-05; Trial Testimony, June 22, 1994, 11. Director of Personnel Bender's hope that Gordon would have reported information about the lifeguards' complaints does not magically convert Gordon's knowledge into the City's knowledge. An aspiration that an individual will convey significant information to appropriate authorities when such knowledge comes into his or her possession is not the same as a legal or City-imposed requirement to convey such information. The common law recognizes situations in which the failure to convey information, while appalling under certain circumstances, nonetheless will not result in liability for the ignorant principal where the agent has not violated a pre-existing requirement to convey such information to the principal. *See, e.g., Wyler v. Korean Air Lines Co.*, 928 F.2d 1167, 1171-72 (D.C. Cir. 1991).

vironment as hostile does not mean that the employer automatically should have been aware of the harassment.

Properly recognizing the distinction between the pervasiveness and constructive knowledge inquiries, the court of appeals could have remanded to the district court to apply the proper inquiry. But the court of appeals also permissibly could do what it did do—which was to examine the record independently and conclude as a matter of law that the record would not support a finding that the City should have known about the harassment. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984) ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law").

Under a negligence standard, constructive knowledge may be found only when a reasonable employer should have known of the harassment. When the district court properly applied a "reasonable employer" standard in the context of plaintiffs' common-law negligence claims, the court correctly held that the evidence did not support a finding of constructive knowledge.[38] *See* Pet. App. 103a. It was only when the district court applied what it apparently perceived as a conclusive presumption mandated by Title VII precedent—that the pervasiveness analysis applicable to finding that the work environment was abusive is

[38] Not only did the district court find insufficient proof to establish that the City should have become aware of the conduct, but it also questioned even the City's *ability* to be aware of such conduct. Specifically, the district court noted that Beverly Barta—to whom the court assigned the "highest level of credibility"—did not hear others complain about Terry and Silverman. Pet. App. 84a. The district court therefore found that Barta's "lack of awareness of other lifeguards' complaints about Terry and Silverman's conduct casts doubt on the City's ability to be aware of such conduct." *Id.*; *see also* J.A. 228-31 (district court, in ruling on directed verdict motions, expressed serious doubt on how the City could be aware when Barta was not).

the same as the analysis required to show the employer's knowledge—that the court erred. The district court's own finding of lack of constructive knowledge on the common-law negligence claims demonstrates that the court of appeals was correct in concluding as a matter of law that the record does not support the view that the City should have known about Terry's and Silverman's conduct.

The en banc court's opinion recited the record facts on which the court relied in holding that a reasonable employer should not have had such knowledge:

> The lifeguards were stationed at a remote location and had little contact with City officials. The harassment itself occurred intermittently over a long period of time. Faragher worked for the City mostly on a part-time and summer basis, and the district court's holding was premised upon a few, discrete instances of harassment. Another lifeguard, Kelly Evans, was a friend of Faragher's, yet the two never discussed sexual harassment and there is no evidence that Ms. Evans was otherwise aware of Terry's and Silverman's harassing behavior towards Faragher. And, as part of her duties as Recreation Superintendent, Sandy Dioli-Kumm occasionally counseled some of the lifeguards. Ewanchew came to see Dioli-Kumm to discuss work-related issues on several different occasions but never mentioned anything about sexual harassment or offensive words or touching by Terry or Silverman; nor is there any evidence that Dioli-Kumm was otherwise aware of such harassment.
>
> Finally, the district court found that the confined space at the lifeguard headquarters building, along with the disproportionate ratio of female to male lifeguards, were in and of themselves conducive to a sort of camaraderie that might be considered "somewhat boisterous." Despite this, however, Ewanchew stated that the atmosphere in the locker room was generally respectful among members of a particular shift.

Pet. App. 16a-17a. The court of appeals was correct in viewing these facts as insufficient to establish constructive knowledge on the part of a reasonable employer.

C. Negligence Cannot Be Established Solely On The Basis Of An Employer's Failure To Disseminate Its Sexual Harassment Policy.

Contrary to petitioner's suggestion that the City should be found liable under a negligence standard for failure to distribute its written sexual harassment policy, the court of appeals correctly recognized that the evidence cannot support a finding of constructive knowledge on this basis. Courts correctly have recognized that an employer's failure to establish or disseminate a strong anti-harassment policy does not alone support a finding of negligence. *See, e.g., Bouton*, 29 F.3d at 109 ("The lack of a separate, written grievance policy for sexual harassment is not dispositive."); *Foster v. Township of Hillside*, 780 F. Supp. 1026, 1041 (D.N.J.), *aff'd mem.*, 977 F.2d 567 (3d Cir. 1992); *Linson v. Trustees of the Univ. of Pa.*, No. 95-3681, 1996 U.S. Dist. LEXIS 12243, at *33-35 (E.D. Pa. Aug. 21, 1996) (Title IX case). Under a negligence standard, the proper inquiry is whether a "reasonable employer" would have distributed a policy and would have learned of the harassment and taken remedial action after having done so.[39] Among other things, this inquiry requires consideration of the guidance employers had in the mid- to late-1980s concerning the duty to promulgate sexual harassment policies, the actual frequency with

[39] Here, the record shows that the City's failure to disseminate its policy effectively to Marine Safety Section employees was unconnected to the City's lack of knowledge. As the court of appeals observed, "[t]he district court did not find that the City would have known about the harassment if it had effectively disseminated this policy; and indeed, the record indicates that failure to disseminate this policy was not the reason why the City did not know about the harassment." Pet. App. 17a n.11.

When Faragher read the revised sexual harassment policy in May 1990, she did not come forward with any complaint despite the policy's explicit urging that employees report offending conduct. Trial Testimony, June 22, 1994, 213-15; J.A. 188, 269-72.

which policies were distributed at that time, and enforcement of such policies.[40]

There simply is no duty imposed by statute or otherwise for an employer to have a disseminated sexual harassment policy. Certainly up until 1990, employers had little guidance from the EEOC about efficacious anti-harassment programs. It was not until March 1990 that the EEOC announced that "[a]n effective preventative program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented." EEOC Policy Guidance on Sexual Harassment, 8 Fair. Empl. Prac. Manual (BNA) 405:6681, 6699 (Mar. 19, 1990).[41] Petitioner suggests that the City had a "minimum" duty of "reasonable care" to develop "a vigorous prevention program and an effective enforcement mechanism." Pet. Br. 39-40 (footnotes omitted). But even two years after the last conduct here, many employers remained unaware of any such duty: a 1992 survey of businesses found that less than half of the responding companies had a sexual harassment policy, and a third had not "even thought about" formulating a policy. Christopher Caggiano, *"What Are You Doing About Sexual Harassment?,"* Inc., Aug. 1992, at 16.[42]

[40] The EEOC's own December 1985 brief to the Court in *Meritor* suggested that an employer that lacked an expressed policy against sexual harassment should be liable for hostile-environment harassment only "if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials." Brief for United States and EEOC as *Amici Curiae* in *Meritor* (No. 84-1979) at 26.

[41] The EEOC's 1990 policy guidance also provided concrete details on the EEOC's view of the appropriate design of procedures for resolving sexual harassment complaints. Prior to that time, EEOC regulations adopted in 1980 simply advised employers to "take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment . . . ." 29 C.F.R. § 1604.11(f).

The misconduct generating the claims here occurred from 1985 until April 1990, before the Civil Rights Act of 1991 was passed. As soon as the City became aware of the allegations, it took prompt action to remedy the problem. When faced with an employer in a similar situation, this Court noted that "[t]he law then in effect imposed no liability on an employer who corrected discriminatory work conditions before the conditions became so severe as to result in the victim's constructive discharge." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 282 n.35 (1994). In that context, this Court noted the unfairness of applying the 1991 Act's damages provisions to employers retroactively.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 97-282

In The

Supreme Court of the United States

October Term, 1997

BETH ANN FARAGHER,

Petitioner,

vs.

THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

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STATEMENT OF THE CASE

The Questions Presented in this case address the agency principles to which the Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) commended the lower courts in establishing employer liability for hostile-environment sexual harassment. This case presents the Court with issues of how to apply such common-law doctrines as agency and constructive notice to the statutory tort of sexual harassment.[1]

STATEMENT OF THE FACTS

Several of respondent's statements about the record require correction and/or clarification.

The "immediate disciplinary action against William Terry and David Silverman," Respondent's Brief, ("R. Br.") at 2, was not the swift, firm justice suggested by the tone of Respondent's Brief. Even the district court remarked on what it characterized as the "somewhat cavalier attitude toward the severity of Terry and Silverman's conduct . . . ," Petitioner's Appendix ("Pet. App.") at 81a,[2] displayed by Richard Bender, the City's director

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[1] Also encompassed within the Questions Presented are agency and notice principles that, upon remand, would effect the way in which the lower courts dispose of the state law claims.

[2] The respondent persists in an it's-not-so-bad assessment of Terry and Silverman's behavior toward petitioner and other women during the 1986-1990 period. *See* R. Br. at 10 & n.6. Not only did the district court find that Faragher's evidence met the test set out in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), App. at 86a-90a, but the initial panel of the court of appeals

of personnel and labor relations. Although Bender received Nancy Ewanchew's letter of complaint in April 1990, he did not interview Faragher, or any other female lifeguard, until June 18, 1990, acting only after the South Florida Chapter of the National Organization for Women had involved itself in the controversy, Pet. Br. at 7; Trial Testimony of June 22, 1994 at 160. In a conversation with Silverman, Bender sugarcoated even the modest penalty imposed as something the City simply had to do as a strategy to avoid a lawsuit, assuring Silverman that, "[y]ou all accept it and that will be that." Trial Testimony of June 23, 1994, at 26.

The remoteness of the beach from City Hall, mentioned by the courts below, Pet. App. at 81a, 86a, and seized upon by the respondent, R. Br. at 4, 21, is more illusory than real: less than 1.5 miles – approximately the distance from the Supreme Court to the Washington Monument. Lorraine Gardiner, the recreation superintendent from 1974 through January 1988, visited the headquarters on an average of every other month, and patrolled the beach in her car, sometimes getting out, two to three times a week. J.A. at 239. Sandra Dioli-Kumm, the recreation superintendent from March 1988 to May 1989,[3] visited the beach at least once a week. Trial Testimony of June 23, 1994, at 136-137.

---

noted that it "might have been clear error for the District Court, having credited Faragher's testimony, to find otherwise." App. at 54a.

[3] Ewanchew, Faragher's co-plaintiff, met with Dioli-Kumm once to discuss a personnel evaluation, Trial Testimony of June 23, 1994, at 139-140, not "on several different occasions." R. Br. at 4, n.3.

It is clear from the testimony that the complaints to Lifeguard Captain Robert Gordon occurred prior to Ewanchew's 1990 letter. Faragher testified that she had complained to Captain Gordon prior to April 1990. Trial Testimony of June 22, 1994, at 199. Ewanchew, who resigned in the spring of 1989 and waited for a year after she left the City's employ to write to Bender, the personnel director, J.A. at 119-120, complained to Gordon repeatedly during the time that she worked for the City, J.A. at 115, 144-145, as well as personally witnessed both Faragher and Jamie Harrington, another lifeguard, complain to Gordon about Terry's and Silverman's behavior. J.A. at 117. Gordon also testified that he had received a complaint from Gail Nye, J.A. at 140, who worked at the beach from November 1987 through November 1988. Trial Testimony of June 23, 1994, at 112.

ARGUMENT

With growing recognition of the invidious way in which hostile-environment sexual harassment can be used to poison the workplace, this case presents the Court not merely with the issue of the scope of an employer's liability for supervisor misconduct, but also with the issue of what must an employer do to make its workplace truly accessible to all. Instead of requesting that the Court embrace the "strict liability" that it eschewed in *Meritor*, petitioner (and her *amici*) seek a common-sense approach grounded in traditional agency principles. Respondent, on the other hand, asks this Court to hold that employers ordinarily be immune from liability unless members of "higher management" have personal knowledge of the sexual harassment, an ill-

defined standard that would not encourage policies to eradicate sexual harassment, but rather policies to ensure that those officials remain blissfully ignorant of that abuse, lest they be held liable for it.

I. AN EMPLOYER, PURSUANT TO COMMON-LAW PRINCIPLES OF AGENCY, IS RESPONSIBLE FOR HOSTILE-ENVIRONMENT SEXUAL HARASSMENT COMMITTED BY SUPERVISORY EMPLOYEES WHO USE THEIR SUPERVISORY STATUS TO EFFECT THE HARASSMENT.

Section 219(2)(d) of the Restatement (Second) of Agency (1958) is not "strict liability" in camouflage, as suggested by respondent. *See, e.g.* R. Br. at 19-21. Rather, it is a recognition that a master traditionally has been subject to liability for the torts of his servant where

> the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, *or* he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency (1958), § 219(2)(d) (emphasis added). Respondent proposes an interpretation of this section that renders superfluous the second clause[4] by limiting a principal's liability under the second clause to instances of apparent authority, already encompassed in the first clause, e.g., that kind exhibited by scheming telegraph operators and thieving store managers. R. Br. at 27-31. This constricted interpretation

[4] "The second clause is simply a refinement of the 'apparent authority' doctrine articulated in the first clause. . . ." R. Br. at 31 n.24.

ignores the actual language of section 219(2)(d), effectively deleting the "or" and replacing it with an "and thus." Indeed, on this reading, the entire sub-section would be largely superfluous, since a principal's liability for *fraudulent* use of apparent authority is already set out in section 261 of the Restatement (Second) of Agency.[5] Not even the en banc court adopted this anti-literal reading of section 219(2)(d), agreeing rather that the City would be liable if Terry and Silverman were aided "in their harassment of Faragher by their agency relationship with the City." Pet. App. 64a n.14.

Under respondent's interpretation of Title VII, an employer could be immune from liability – indeed, Title VII would not be violated at all – if a supervisor were to fire a subordinate out of race, national origin or sex-based animus. A supervisor who abuses his supervisory position to intimidate a harassment victim is using and is aided by his supervisory powers in the same way as a racist foreman who uses his hiring-and-firing authority to keep African-Americans off his crew. While each form of behavior can yield similar results – keeping women out of traditionally male occupations such as lifeguarding, for example, and keeping African-Americans out of all white shops – respondent's attempt to recast agency principles flies in the face of the Court's recognition in *Meritor* that "the courts have consistently held employers liable for

[5] Section 261 provides as follows: "A principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."

the discriminatory discharges of employees by supervisory personnel, *whether or not the employer knew, should have known, or approved of the supervisor's actions.*" 477 U.S. at 70-71, (emphasis added) *citing Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972).[6] Such liability clearly follows from the principles of section 219(d)(2) that if an employer gives a lower-level supervisor the authority to manage a workplace, and the supervisor, albeit through malfeasance, uses that power to harm the employees there, then the employer is liable for the damage that it has empowered the supervisor to wreak. *See, e.g., Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982).[7] Were one to accept respondent's reasoning, however, a foreman acting with clearly sexist motivation, ordinarily could fire a female employee without exposing the corporate employer to liability. Indeed, because there would be no Title VII liability, and the fired

---

[6] *Anderson* imposed liability on an employer for a racially motivated discharge by "a person in authority at a lower level of management" despite the fact that "upper management" was "exemplary." 464 F.2d at 725.

[7] The *Henson* court stated:

> [T]he reason for this stern rule is readily apparent:
>
> > When [the employer gave] its [supervisory personnel] authority to fire employees, it also accepted responsibility to remedy any harm caused by [the supervisors'] unlawful exercise of that authority. The modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual action.
>
> 682 F.2d at 909 (quoting *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 436 (D. Utah 1971) (citation omitted)).

worker could not even obtain injunctive relief to get back her job.

So long as the Terrys and Silvermans of the world opt for the relative subtlety of sexual harassment over an announced ban on women in the workplace, respondent's reasoning – which appears also to aspire to a negligence standard for even quid pro quo sexual harassment, R. Br. at 26, n.18 – would shield employers such as the City of Boca Raton from liability for empowering such supervisors to behave as they do. While no one would suggest that the City would have been immune from liability if Chief Terry and Captain Silverman, animated by misogyny, had recommended successfully against hiring Faragher, or initiated discipline that resulted in her being fired based on pretextual grounds, that is precisely the result of applying respondent's logic. Although such a failure to hire or such a dismissal would obviously be aided by Terry's agency relationship, respondent insists that such aid is legally irrelevant unless the agent furthers the principal's business. R. Br. at 25-26.

Considering the remedial purpose of Title VII, however, and the peculiar power that employers have to impose zero-tolerance sexual-harassment policies from the top down, the application of section 219(d)(2) that petitioner seeks is especially consistent with congressional policy to eliminate sexual harassment from the workplace. "[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own," *American Soc. of M.E.'s v. Hydrolevel Corp.*, 456 U.S. 556, 567 (1982) (anti-trust case involving apparent authority), *quoting Gleason v. Seaboard Air Line R. Co.*, 278 U.S. 349, 356 (1929). The Court there

explained that a principal that had enabled its agents to engage in misconduct "should be encouraged to eliminate" the agent's misuse of that power. 456 U.S. at 574. Just as the Court in *ASME* applied agency principles that would encourage principals to eliminate anti-competitive practices by their agents, "especially those who use their positions . . . solely for their own benefit . . . ," here the Court should apply these principles in a way that would encourage employers to eliminate sexual harassment by its supervisory employees.[8]

Respondent urges alternatively that section 219(2)(d) should apply only where a supervisor "affirmatively capitalizes on his supervisory status." R. Br. at 33. Respondent acknowledges that even where a supervisor never makes any such overt threats, subordinates often (indeed, it insists, always) would have good reason to fear that resistance or complaint would lead to retaliation by the supervisor. R. Br. at 15, 20. On respondent's view, however, an employer violates Title VII only when a supervisor expressly warns a victim that he would or could fire her if she physically resists his groping – which essentially is quid pro quo harassment – but not when a

[8] Within the context of civil rights enforcement, likewise, the Court has recognized how efficacious the establishment of a pricetag for non-compliance can be. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975) ("It is the reasonably certain prospect of a backpay award that 'provide[s] the catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices. . . . ' ") The purpose of monetary relief under Title VII is to give managers an "incentive to take preventative measures to ward off discriminatory conduct by subordinates *before* it occurs." *Landgraf v. USI Film Products*, 511 U.S. 244, 283 n.35 (1994).

marginally more subtle supervisor molests a subordinate without so blatantly invoking the fear of dismissal that he well knows is intimidating his victim.[9] Neither Title VII, agency principles nor common sense supports such a gossamer distinction.[10]

Respondent, as did the en banc court, trivializes a literal application of § 219(d)(2) by suggesting that such a reading would collapse "aided in" into little more than "proximity" to impose liability upon an employer. R. Br. at 33-34, Pet. App. at 12a. Such hyperbole distorts petitioner's argument. Petitioner does not contend that the mere fact that a supervisor may work near a subordinate is sufficient to establish liability under section 219(d)(2).[11]

[9] *See, e.g., Eichenwald v. Krigel's, Inc.*, 908 F. Supp. 1531, 1566 (D. Kan. 1995) ("The plaintiffs were justifiably afraid to complain about Mr. Shine's conduct based upon his upper level management position with the defendants and his dominating, hostile and volatile personality.")

[10] *See Nichols v. Frank*, 42 F.3d 503, 512 (9th Cir. 1994) ("Implicit quid pro quo . . . is far more likely to take place than is the explicit variety. As time goes by and harassers learn that they can no longer victimize their prey at will, their actions become less overt. In Hollywood, for example, the casting couch has been replaced by more subtle techniques. Yet for the potential employee, the result is the same.")

[11] A supervisor, however, could be aided by his position if he used his authority to require the victim to be near him. *E.g. Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1440-41 (10th Cir. 1997) (supervisor ordered victim to accompany him to an isolated part of a mine where he harassed her), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97-232); *Farris v. Board of County Comm'rs of Wyandotte County*, 924 F. Supp. 1041, 1047 (D. Kan. 1996) (supervisor directed subordinate to meet him at a bar where he allegedly exposed himself).

The gravamen of petitioner's argument is that a supervisor may be aided in his harassment by his control over the victim's employment and prospects, particularly her fear that he will use that power to retaliate if she resists or complains.[12]

Respondent does not argue that supervisors cannot exercise such sway over their subordinates, but rather that such a power differential is so commonplace that it must be disregarded[13] – lest every woman who suffers harassment at the hands of her immediate boss be able to impose liability upon her employer by complaining that her employer has given her supervisor power and that the supervisor has misused that power to her detriment. *Supra* n.7 and accompanying text. That equation – inherent power, multiplied by fear, equals actionable intimidation – is modified, however, by the requirement inherent in any plaintiff's case that a victim's perception be reasonable. It is not sufficient that the victim be afraid:

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[12] Of course, a supervisor could exploit his supervisory position in other ways. *E.g., Henry v. Gehl Corp.*, 867 F. Supp. 960, 966 (D. Kan. 1994) (supervisor directed victim to stand up in front of male co-workers and then made offensive comments about her anatomy); *Rauh v. Coyne*, 744 F. Supp. 1186, 1190 (D.D.C. 1990) (supervisor gained access to restricted area in which victim worked by using a key possessed only by supervisors).

[13] R. Br. at 15 ("[a] test that rests on the victim's fear of retaliation if she complains . . . will result in automatic liability in cases in which the harasser is a supervisor. . . . "); *see also id.* at 20 ("Because the relationship between a supervisor and a subordinate is by definition one in which the supervisor holds some job power over the subordinate, the inevitable result in these circumstances is that a victim always will have . . . the reasonable fear necessary to render an employer liable.")

rather, she must be *reasonably* in fear of retaliation. Just as the Court has required that only an "objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive . . . ," is actionable under Title VII, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), finders of fact can, and should, view the supervisor-victim dynamic within the totality of the circumstances and should disregard an employee's chimerical assessment of a supervisor's power.

It is respondent's fear of strict liability, not petitioner's fear of retaliation, that is fanciful. Respondent's argument assumes that employers are powerless to effectively reassure employees that they may with impunity resist or complain about sexual harassment. The very purpose of a sound anti-harassment policy – zero-tolerance, mandatory up-the-line reporting by all supervisors, and aggressively communicated assurances of non-retaliation – is to do precisely that. Employers, in fact, have been successful in demonstrating that their practices had dispelled any fear employees might have had about resisting or complaining about harassment. *See, e.g., Bouton v. BMW of North America, Inc.*, 29 F.3d 103 (3rd Cir. 1994). Petitioner urges a reading of section 219(2)(d) that provides incentive for employers to eradicate such well-founded fears on the part of harassment victims, such as those harbored in the instant case that "Bill Terry could do things . . . that I thought were completely wrong and get away with it, because the City – or the people at City Hall would just back him up or support him, and cover it and just let it be." J.A. at 189.[14]

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[14] Significantly, respondent nowhere denies that petitioner regarded a complaint against Chief Terry as both pointless and

Respondent asserts that there was no evidence that Terry and Silverman used their authority in harassing petitioner. R. Br. at 11-12, 19, 35 n.28. Faragher alleged and the district court found, however, that Chief Terry and Captain Silverman's supervisory position facilitated the harassment, which in turn was enhanced by the City's laxity in addressing sexual harassment. Pet'r. Br. at 22-23, 29-30; Pet. App. at 71a-79a, 83a. Faragher expressly testified that she felt that "if I did complain, there was probably a good possibility that I would lose my job," J.A. 187 – a perception that was especially reasonable under circumstances in which no one other than the personnel director testified to knowing anything about the City's 1986 sexual harassment policy.[15]

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dangerous, and nowhere suggests that the view shared by petitioner and Captain Gordon was unreasonable.

[15] Although petitioner's argument is grounded in Chief Terry and Captain Silverman's real authority over her, to argue as respondent does that "[t]he common-law agency concept of 'apparent authority' has no application to sexual harassment cases based on hostile work environment," R. Br. at 27, is to ignore the viewpoint of those upon whom a sexual harasser is most likely to prey – i.e., the ones he senses as being so powerless, and perceiving him as so powerful, that they will not complain.

II. RESPONDENT HAD KNOWLEDGE, BOTH ACTUAL AND CONSTRUCTIVE, OF TERRY AND SILVERMAN'S SEXUAL HARASSMENT OF PETITIONER.

A. Gordon's (and the City's) Actual Knowledge

Under section 272 of the Restatement (Second) of Agency (1958), an employer is charged with knowledge of information known to an employee who has a duty to report that information to other officials. Respondent seeks to supplant that doctrine with a rule requiring that notice be given to someone within "higher management." R. Br. at 5, 7, 12, 14, 42-44. However, *Young v. Bayer Corp.*, 123 F. 3d 672 (7th Cir. 1997), on which respondent relies, rejects the higher-management notion and suggests, sensibly, that the twin inquiries should be, "who has the authority to terminate the harassment of which the plaintiff is complaining and did the plaintiff complain to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it." 123 F.3d at 675.

The inquiry prescribed in *Young* – whether the lifeguard captain to whom several women complained about sexual harassment had a duty to report the complaints up the ladder?[16] – comports with the traditional agency principles to which the Court said in *Meritor* that courts

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[16] In *Dickson v. Graham-Jones Paper Company*, 84 So.2d 309 (Fla. 1956), on which respondent also relies, the knowledge that the court refused to impart to the employer was knowledge on the part of the very employee whose misconduct – the keeping of a "fighting cock" in the company office – had caused the harm in question. Under agency principles, knowledge on the part of such a perpetrator, e.g., knowledge in this case by Terry

should look for guidance.[17] On the contrary, a "higher management" standard is one that is alien to agency law – as well as, it would appear from the dearth of authority for it in Respondent's Brief, to any area of the law outside of sexual harassment.[18]

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that he was harassing Faragher, is not attributable to his employer if the third party knows the agent's interests are adverse to those of the employer. Restatement (Second) of Agency (1958), sections 271, 280, 496.

[17] The factual context of Gordon's receipt of the complaints is important because it distinguishes the case at bar from the two cases relied upon by respondent concerning ineffective notice to agents. Several women lifeguards, including petitioner and her co-plaintiff, complained about the kind of conduct that personnel director Bender testified Gordon was required to pass up the line (candid admissions that respondent now attempts to rephrase to nothing more than expressions of "aspiration" and "hope." *See* R. Br. at 45, n.37. Gordon did nothing. The district court found this combination of knowledge and inaction on the part of an agent of the City, i.e., Gordon, to provide a basis for imputing to the City knowledge of Chief Terry and Captain Silverman's conduct. Pet. App. at 93a. Neither of the cases relied upon by respondent involve such notice and inaction. Rather, they treat with issues of whether an insurance company would be bound by notice to its corrupt sales agent that an insured had submitted a fraudulent statement of his medical condition, *Mutual Life Insurance Co. v. Hilton Green*, 241 U.S. 613, 623-624 (1916), and whether a notice of cancellation of a fidelity bond was sufficient when the notice was not to the employer who purchased the bond, but rather to the employee whose insurance was being terminated. *Graves v. Iowa Mut. Ins. Co.*, 132 So.2d 393 (Fla. 1961). Both of those cases held the notice to the faithless employees to be inadequate; neither case, however, relates to the circumstances in the case at bar.

[18] Florida negligence law, for example, does not require notice to "higher management" of dangerous conditions. *See, e.g., City of Miami v. Fletcher*, 167 So.2d 638, 639 (Fla. Dist. Ct. App. 1964) (rubbish truck driver's knowledge of prior brake failure "is obviously that of a responsible agent and therefore chargeable to the City").

Additionally, from the standpoint of making the nation's anti-sexual harassment policy user friendly, and thereby effective, it would be unwise to require notice to "higher management" as a condition precedent to maintaining a sexual harassment action: consider the plight of an hourly-wage-level harassment victim who might feel comfortable reporting to her second-level supervisor about how her foreman was behaving, but who would be intimidated at the thought of taking those possibly intimate complaints to relative strangers in the executive suite.[19]

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[19] In drafting the Civil Rights Act of 1991, Congress considered and rejected a proposal that would have required harassment victims to pursue internal complaint procedures. H.R. Rep. No. 102-40(I), pt. 1, at 103 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 641. The same background facts that motivated Congress in 1991 continue to militate against the imposition of any internal notice requirements for sexual harassment liability: " '[E]mployers have not designed adequate complaint mechanisms' " and " '[v]ictims perceive that to come forward within their workplaces is to be labeled as "troublemakers" or "oversensitive." ' " *Id.* (citing testimony of Dr. Freada Klein). Sexual harassers rely on and manipulate their victims' fears about challenging them within the workplaces. A requirement of notice to "higher management" would play into harassers' hands and would lead to a result that Congress sought to avoid: the dismissal of meritorious claims, even claims based on "egregious harassment," because "every technicality" or internal workplace procedure had not been followed.

Finally, there is a major problem with the "higher management" concept, which is: what is "higher management?" No one – neither courts nor victims – knows what "higher management" means. No case law defines it, and respondent offers no test by which courts could determine whether a harassment victim had complained to the proper person.

B. Constructive Knowledge, Based on Pervasiveness

The parties are in agreement that the question of whether harassment is sufficiently severe or pervasive to create a hostile work environment is distinct from, although related to,[20] the question of whether that harassment is so severe and/or pervasive that an employer should have been aware of it. While the en banc majority acknowledged that "there may be other cases in which the same level of pervasiveness can support a finding both of hostile environment and constructive notice," Pet. App. at 16a, n.10,[21] it stated that the district court had

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[20] As Judge Posner noted in *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1422 (7th Cir. 1986), "an employer . . . is unlikely to know or have reason to know of casual, isolated, and infrequent slurs; it is only when they are so egregious, numerous, and concentrated as to add up to a campaign of harassment that the employer will be culpable for failing to discover what is going on and to take remedial steps."

[21] Lower courts have repeatedly recognized that the harassment in a particular case could be so severe and/or pervasive that the employer should have known of the problem. *See, e.g., Smith v. St. Louis University*, 109 F.2d 1261, 1265, n.3 (8th Cir. 1997); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016 (8th Cir. 1988); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988); *Yates v. Avco Corp.*, 819 F.2d 630, 635-36 (6th Cir. 1987).

"conflated the two inquiries." Pet. App. at 16a. The district court found constructive knowledge arising out of what it properly characterized as the "fairly frequent[]," Pet. App. at 89a, harassment of seven women[22] over a period of five years – harassment so flagrant, for example, that the women felt compelled to shower in protective groups.[23]

The United States suggests that the district court may have confused these two legal standards, and suggests that this issue be remanded to the district court. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner, at 28-30. Although petitioner does not believe that the district judge applied an incorrect legal standard to her Title VII claim,[24] she agrees that, upon the Court's finding that respondent is liable under Title VII, the case

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[22] In addition to petitioner, the district court identified six other victims of harassment by Terry and Silverman: Nancy Ewanchew, Beverly Barta, Jamie Harrington, Victoria Bonner, Gayle Nye and Janice Chisesi. Pet. App. at 73a-78a.

[23] The en banc majority, disregarding the mandate of Federal Rule of Civil Procedure 52(a) recharacterized the evidence as showing that the harassment only had "occurred intermittently over a long period of time." Pet. App. at 16a. Such ample evidence supported the district court's finding that the district court could not be said to be clearly erroneous.

[24] Where an appellate court believes that the trial court's "findings are infirm because of an erroneous view of the law, a remand [to the trial court] is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982).

should be remanded for the consistent application of the same standard to the common law claims.[25]

C. Constructive Notice, Based on the Absence of an Effective Policing Mechanism

As to whether it was negligent for the respondent not to have distributed to its employees, or to have included in the employee handbook, its 1986 sexual harassment policy, respondent argues that a reasonable employer during the 1980s would not necessarily have taken such actions because (1) the EEOC had not yet published its 1990 guidelines and (2) there was in this era so little awareness of sexual harassment as a problem that promulgation and enforcement of policies dealing with it was not recognized as a standard of care. *See* R. Br. at 48-50.

In fact, the EEOC's 1980 guidelines made crystal clear that an employer needed to take aggressive measures to bring its anti-harassment policies to the attention of its employees.[26] In addition, this Court's decision in *Meritor*

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[25] This issue was one of petitioner's original points on appeal. The district court held that the constructive notice test, in a state-law negligence context, "does not contemplate the pervasiveness analysis of Title VII." Pet. App. at 103a. While petitioner raised that in her Petition for Rehearing En Banc, the state-law negligence issues was not one of the issues that the court of appeals instructed counsel to address.

[26] EEOC regulations in effect since 1980 prescribed that:

> An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, . . . informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f) (1986).

clearly put employers on notice of their obligation to address the problem of sexual harassment through not merely articulating, but also implementing, comprehensive policies. 477 U.S. at 72-73. Respondent, however, did virtually nothing – a strategy that enabled respondent to then claim ignorance, even in the face of wide media treatment that brought harassment to the consciousness of virtually anyone who was not trying to ignore it.[27] Respondent now seeks to avoid liability through a lack of vigilance that can only be described as either willful ignorance or gross lack of care.[28]

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[27] A Lexis/Nexis(R) search turned up 557 stories about sexual harassment in *The New York Times* prior to 1990, 32 references in *Fortune*, 24 in *Business Week* and 24 in *Forbes* discussing sexual harassment. *See, e.g.*, Walter Kiechel III & Darienne L. Dennis, "The High Cost of Sexual Harassment," *Fortune*, Sept. 14, 1987, at 147 ("For an employer concerned about preventing problems, the steps to take are fairly obvious. At a minimum, have a well-publicized corporate policy spelling out what constitutes harassment and forbidding such behavior.") The popular movie, "Nine to Five," (IPC Films 1980), had satirized sexual harassment behavior. *The Miami Herald*, the Palm Beach Edition of which circulated in Boca Raton during the relevant years, mentioned sexual harassment in 119 articles during 1989, 67 in 1988, 59 in 1987, 90 in 1986 and 62 in 1985, according to an electronic search of its library.

[28] The Court in *American Soc. of M.E.'s* rejected allowing a principal to "avoid liability by ensuring that it remained ignorant of its agents' conduct," a policy that it said would "encourage [a principal] to do as little as possible to oversee its agents." 456 U.S. at 573.

CONCLUSION

In summary, adoption of the agency and notice interpretations urged by petitioner would energize the Court's command in *Meritor* that lower courts employ traditional agency principles as a means of effecting Congress' policy of preventing sexual harassment. Just as a sound application of agency principles to anti-trust situations prompts businesses to ensure that their agents do not engage in anti-competitive practices, lest the principals suffer damages for even the unauthorized, self-serving acts of their agents, the application of agency principles in Title VII actions would encourage employers to detect and prevent sexual harassment. The interpretations urged by petitioner would result in no-nonsense policies, increased vigilance by employers, and better behavior by supervisory personnel.

For the above reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

BETH ANN FARAGHER, PETITIONER

v.

CITY OF BOCA RATON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the court of appeals adopted the correct legal standard for deciding when a supervisor's sexual harassment of a subordinate is aided by his agency relationship with the employer.

2. Whether the court of appeals adopted the correct legal standard for deciding when a supervisor's knowledge of sexual harassment may be imputed to the supervisor's employer.

3. Whether the court of appeals erred in failing to remand to the district court the question whether respondent's failure to disseminate its policy against sexual harassment warranted a finding that respondent should have known about the sexual harassment of petitioner.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits sexual harassment in the workplace on the basis of sex. The Attorney General is responsible for enforcing Title VII with respect to public employers. 42 U.S.C. 2000e-5(f)(1). The United States, in its capacity as employer, has a strong interest in ensuring the fair and balanced enforcement of Title VII. The Equal Employment Opportunity Commission (EEOC) has authority to enforce Title VII with respect to private employers. The EEOC participated as amicus curiae in this case in the en banc proceeding in the court of appeals.

STATEMENT

1. Petitioner Beth Ann Faragher was employed by respondent City of Boca Raton, Florida, as an ocean lifeguard. Pet. App. 70a. Petitioner worked in that capacity on an intermittent basis from September 1985 through June 1990. *Ibid.* Respondent hired its first female lifeguard in 1977, and during the time that respondent was a lifeguard, only four to six of respondent's 40 to 50 lifeguards were women. *Id.* at 72a. All lifeguards shared the same locker room and showers. *Ibid.*

Petitioner's immediate supervisor was David Silverman. Pet. App. 71a. As marine safety lieutenant and later as captain, Silverman supervised the lifeguards' daily duties, designated their work and shift assignments, and supervised their physical fitness routines. *Id.* at 92a. As a lieutenant and later as a training captain, Robert Gordon had similar responsibilities. *Ibid.* Silverman and Gordon reported to Bill Terry, chief of the marine safety section. *Id.* at 71a. Terry interviewed and hired all lifeguards, subject to review at higher levels. *Id.* at 92a. He was also authorized to supervise all aspects of lifeguards' work and to give oral and written reprimands. *Ibid.* Terry reported to the Recreation Superintendent, who worked at respondent's City Hall. *Id.* at 71a-72a. Lifeguards were located far from City Hall and had almost no contact with anyone higher than Terry in the chain of command. *Id.* at 3a, 93a.

Terry sexually harassed petitioner. In particular, Terry would put his arm around petitioner and rest his hand on her buttocks. Pet. App. 74a. While it is unclear the extent to which petitioner was aware of it, Terry engaged in offensive conduct towards other

female lifeguards as well: He referred to women as "cunts" and "bitches" (*id.* at 74a-75a); he touched female lifeguards on the thigh, breast, hip, and buttocks without their consent (*ibid.*); he pressed himself against one lifeguard's buttocks while she was at a water fountain and moved his hips against her in a sexual manner (*id.* at 74a); and he asked one woman on her first interview if she was going to "fuck" or "screw" all of the male lifeguards like the rest of the female lifeguards (*id.* at 75a).

Silverman also sexually harassed petitioner. He performed a pantomime in front of petitioner and another female lifeguard in which he flicked his tongue to depict cunnilingus. Pet. App. 76a. He also tackled petitioner and told her, "If you had tits I would do you in a minute." *Ibid.* Again, while it is unclear the extent to which petitioner was aware of it, Silverman also engaged in sexually offensive conduct towards other female lifeguards: He commented on one female lifeguard's breasts (*id.* at 78a); he told another that he could see her nipples under her bathing suit because it was cold (*id.* at 77a-78a); he told that same lifeguard that he would like to "eat between her legs" (*id.* at 78a); he told another lifeguard on her first day on the job that "I want to lick your clit" (*id.* at 79a); and, on another occasion, he reprimanded that same lifeguard by yelling, "What the fuck are you doing, you cunt" (*ibid.*).

Although respondent had a written policy against sexual harassment, neither Terry nor Silverman was aware of the policy, and there was "a complete failure" to disseminate that policy to marine safety section employees. Pet. App. 83a. Petitioner complained to Gordon about Terry and Silverman. *Id.* at 82a. Most of the other female lifeguards also com-

plained to Gordon about Silverman's conduct. *Ibid.* The female lifeguards spoke to Gordon because they held him in high esteem, not because he was their superior. *Ibid.* Gordon did not report the complaints to any of respondent's management officials. *Ibid.* Gordon told one lifeguard that respondent just didn't care. *Ibid.*

In April 1990, one former female lifeguard wrote a letter to respondent's director of personnel complaining about Terry's and Silverman's sexual harassment. Pet. App. 80a-81a. That former lifeguard had been reluctant to complain prior to becoming tenured in a new job. *Id.* at 83a. After an investigation, respondent determined that Terry and Silverman had engaged in sexual harassment of female lifeguards and reprimanded and disciplined both men. *Id.* at 80a. Terry forfeited 160 hours of annual leave; Silverman forfeited 40 hours of annual leave. *Ibid.* In June 1990, petitioner resigned from her job as a lifeguard to attend law school. *Id.* at 72a-73a.

2. In 1992, petitioner filed suit against respondent in the United States District Court for the Southern District of Florida. She alleged that respondent had subjected her to a hostile work environment on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 69a-70a.[1]

After a non-jury trial, the district court found in favor of petitioner. Pet. App. 69a-104a. It found that Terry's and Silverman's conduct was sufficiently severe and pervasive to alter the conditions of petitioner's employment and create an abusive work environment. *Id.* at 90a. The court further determined that respondent was liable for that hostile work environment, on three grounds. *Id.* at 90a-95a. First, it found that the severity and pervasiveness of the conduct of Terry and Silverman supported an inference that respondent should have known about the harassment and taken steps to address it. *Id.* at 92a, 94a. Second, it found that Terry and Silverman acted as agents for respondent and that respondent was liable on that basis, without regard to whether it knew or should have known about the harassment. *Id.* at 93a. Finally, the district court found that Gordon's knowledge of the harassment provided a further ground for imposing liability on respondent. *Ibid.*

The district court awarded petitioner $1.00 in nominal damages on her Title VII claim. Pet. App. 95a. The court did not award compensatory relief because the events took place prior to the enactment of the amendment to Title VII providing for such relief. *Ibid.* The court did not award injunctive relief because petitioner was no longer employed by respondent. *Ibid.*

3. A panel of the Eleventh Circuit reversed the district court's judgment for petitioner on her Title VII claim. Pet. App. 41a-68a. The court did not disturb the district court's finding that petitioner had been subjected to a hostile work environment. *Id.* at 52a-55a. The court concluded that, while the district court arguably relied on some conduct of which petitioner had been unaware, petitioner's testimony was sufficient by itself to support the district court's finding that petitioner had been subjected to a hostile work environment. *Id.* at 53a-54a.

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[1] Petitioner and another former lifeguard also sued Terry and Silverman. Pet. App. 69a. Those claims are not at issue here and therefore will not be discussed further.

The court went on to hold, however, that respondent was not liable for the hostile work environment that petitioner had experienced. It determined that Silverman and Terry had not acted within the scope of their employment, Pet. App. 59a, that they had not been aided in their harassment by the existence of the agency relationship with respondent, *id.* at 64a n.14, and that respondent had neither actual nor constructive knowledge of the harassment, *id.* at 65a-67a.

4. The Eleventh Circuit granted rehearing en banc to address the scope of an employer's liability for a supervisor's creation of a hostile work environment. Pet. App. 5a. By a 7-5 vote, the en banc court, like the panel, reversed the district court's Title VII judgment in favor of petitioner. *Id.* at 1a-40a. The majority first held that respondent could not be held vicariously liable for Terry's and Silverman's sexual harassment. It determined that Silverman and Terry had acted outside the scope of their employment because, in harassing petitioner, they had been "seeking to further personal ends" and not seeking "to perform any service for [respondent]." *Id.* at 12a. The majority also determined that Silverman and Terry had not been aided in accomplishing the harassment by the existence of an agency relationship with respondent because "[n]o person threatened to fire or demote [petitioner] for refusing to accommodate Terry's and Silverman's harassing overtures," and no employment decisions had been made "based upon [petitioner's] response to their sexual overtures." *Id.* at 13a.

The majority further held that respondent could not be held directly liable for the harassment suffered by petitioner, because respondent had neither actual nor constructive knowledge of the harassment. Pet.

App. 14a-18a. The majority concluded that Gordon's knowledge of the harassment could not be imputed to respondent both because Gordon "did not rank as higher management" and because Gordon had not learned about the harassment as petitioner's supervisor, but "as a friend held in high repute by his colleagues." *Id.* at 15a & n.9. The court also concluded that, while the level of harassment had been sufficiently pervasive to alter petitioner's work conditions, it had not been so pervasive that respondent should have known about it. *Id.* at 15a-17a. In the majority's view, the district court had erred by equating those two inquiries. *Id.* at 16a. Finally, the majority concluded that constructive knowledge could not be imputed to respondent based on respondent's failure to disseminate its policy against sexual harassment. *Id.* at 17a n.11. The court stated that "[t]he district court did not find that [respondent] would have known about the harassment if it had effectively disseminated this policy," and "the record indicates that failure to disseminate this policy was not the reason why [respondent] did not know about the harassment." *Ibid.*

Judge Barkett (joined by Judges Hatchett and Kravitch) filed an opinion dissenting in relevant part. Pet. App. 18a-31a. She concluded that the district court did not clearly err in finding that the pervasiveness of the harassment supported an inference that respondent had constructive notice of it. *Id.* at 20a-23a. Judge Barkett also concluded that respondent was vicariously liable for the harassment, both because Terry and Silverman had acted within the scope of their employment when they harassed petitioner and because they had been aided in their harassment of petitioner by their agency relationship with re-

spondent. Judge Barkett reasoned that the harassment was within the scope of Terry's and Silverman's employment because it had occurred while they were exercising their authority to direct petitioner in the performance of her duties. *Id.* at 28a-29a. Judge Barkett concluded that Terry and Silverman had been aided in harassing petitioner by their agency relationship with respondent because Terry and Silverman "were granted virtually unchecked authority over the work environment," *id.* at 30a, and because respondent's policy on sexual harassment "was never disseminated among Marine Safety Section employees," leaving employees without any "effective avenue of redress," *id.* at 31a.

Judge Tjoflat filed a separate opinion dissenting in relevant part. Pet. App. 32a-38a. Judge Tjoflat concluded that, because "Terry was in charge of the workplace" and "he was aware that [petitioner] was working in a sexually abusive environment and did nothing to correct the situation," respondent should be liable "for the injury she sustained." *Id.* at 35a-36a. Judge Tjoflat also concluded that, by failing to communicate its policy to its employees or to identify the person to whom complaints of sexual harassment should be made, respondent had "effectively concealed from those employees the avenue for redress of grievances." *Id.* at 36a. Exonerating an employer in such circumstances, Judge Tjoflat concluded, "dilutes the employer's duty under Title VII to maintain a workplace free of severe and pervasive sexual harassment," "places an undue burden on employees who wish to complain of harassment in the workplace," and "has the potential to breed disrespect for the law." *Ibid.*

Judge Anderson also filed an opinion dissenting in relevant part. Pet. App. 38a-40a. Judge Anderson concluded that Gordon's statement that respondent did not care about sexual harassment supported the district court's finding of constructive notice. *Id.* at 39a. Judge Anderson also concluded that respondent should be liable under agency principles, because respondent had "left Terry wholly unsupervised with respect to Terry's management of the workplace," "gave Terry no effective instructions with respect to its sexual harassment policy," and "did not disseminate its policy against sexual harassment to [petitioner] or similarly situated employees." *Id.* at 39a-40a.

SUMMARY OF ARGUMENT

A. In *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), the Court held that common law agency principles should guide courts in deciding when an employer is liable for a supervisor's sexual harassment of a subordinate. Under common law agency principles, if a supervisor is aided by his agency relationship with the employer in creating a hostile work environment, the employer is liable without more. If the supervisor is not aided by the agency relationship, and instead simply takes advantage of his proximity to an employee in the same way that a co-worker could, the employer is liable if it knew or should have known about the harassment and failed to take appropriate corrective action.

B. Although the court of appeals recognized that an employer is liable for a supervisor's creation of a hostile work environment when the supervisor is aided by his agency relationship in creating it, the court concluded that a supervisor is "aided" in the

relevant sense only when the supervisor threatens or imposes adverse employment conditions. Even when a supervisor refrains from explicitly threatening adverse employment consequences, however, a subordinate is bound to be aware that the supervisor has that power. A supervisor bent on exploiting his authority therefore may not need to make explicit threats; he may be able to rely on implicit understandings. And that is particularly true when the employer has given the supervisor an extensive delegation of authority or when there is no effective policy against sexual harassment. Thus, even when there are not explicit threats, a plaintiff should be able to demonstrate that the supervisor has been aided by his agency relationship if she shows that (1) she feared adverse employment consequences if she resisted or complained, and (2) her fear was objectively reasonable in light of the employer's practices and the supervisor's conduct.

Under that standard, the district court's subsidiary findings could support a finding that respondent's supervisors were aided by their agency relationship in harassing petitioner. In essence, the district court found that respondent gave Terry and Silverman virtually unchecked authority over petitioner in a remote location, and failed to provide petitioner with an effective avenue for seeking protection against sexual harassment. Those facts could support a finding that petitioner reasonably feared adverse employment consequences if she resisted or complained. Because that inquiry is a factual one that has not yet been addressed by the district court, the question whether Terry and Silverman were aided by their agency status in harassing petitioner should be remanded to the district court.

C. Respondent also might be liable by virtue of supervisor Gordon's knowledge about the harassment. The court of appeals refused to attribute Gordon's knowledge to respondent because Gordon was not a member of high-level management and because he learned about the harassment in his capacity as a friend. Under agency principles, however, the knowledge of an agent is attributed to an employer as long as the agent has a duty to disclose the information to the employer and the agent did not receive the information in confidence. The case therefore should be remanded for findings on (a) whether Gordon had a duty to report acts of harassment to officials who had the authority to stop it and (b) whether Gordon learned about the harassment through confidential disclosures.

D. Finally, respondent also might be liable on a "should have known" theory, because it failed to disseminate its policy against harassment, potentially leaving petitioner and other lifeguards without an effective avenue of complaint, and leaving supervisor Gordon with the belief that respondent did not care about harassment. The court of appeals erred in rejecting that theory of liability based on the district court's failure to find that respondent would have learned about the harassment if it had effectively disseminated the policy, and on the court of appeals' view that the record indicates that respondent would not have learned about it. When a district court has failed to make a finding on a dispositive factual issue, an appellate court ordinarily should remand the issue for that determination, rather than decide the issue for itself based on its view of what the record indicates. The court of appeals' judgment in this case should

therefore be reversed and the case remanded for further proceedings.

ARGUMENT

THE COURT OF APPEALS APPLIED THE WRONG LEGAL STANDARDS IN DECIDING THAT RESPONDENT WAS NOT LIABLE FOR THE HOSTILE WORK ENVIRONMENT CREATED BY ITS SUPERVISORS

A. An Employer Is Liable For A Supervisor's Harassment Of A Subordinate When The Supervisor Is Aided In The Harassment By His Agency Relationship Or When The Employer Knew Or Should Have Known About The Harassment And Failed To Take Appropriate Corrective Action

1. Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer"

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2(a)(1). In *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986), the Court held that employment discrimination that takes the form of sexual harassment violates Title VII. The Court explained that, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64. The Court further held that Title VII's protection against sexual harassment encompasses more than a prohibition against "quid pro quo" harassment, where submission to sexual demands is made a condition of a tangible job benefit, such as a promotion or a raise. *Ibid.*; see 29 C.F.R. 1604.11(a)(2) (defining quid pro quo harassment). Title VII also provides protection against sexual harassment that takes the form of a hostile work environment, *i.e.*, harassment that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67.

In *Meritor*, the Court also addressed the question of when an employer is liable for a supervisor's sexual harassment of a subordinate. The court of appeals in that case had held that employers are always automatically liable for sexual harassment by their supervisors. 477 U.S. at 72. The employer argued that a policy against discrimination with a grievance procedure, coupled with an employee's failure to invoke that procedure, should insulate an employer from liability. *Ibid.* The Court rejected both of those per se rules. *Ibid.* The correct approach, the Court held, is informed by the text of Title VII. By defining "employer" to include any "agent," Congress indicated that it "wanted courts to look to agency principles for guidance." *Ibid.* The Court cautioned, however, that "common-law principles may not be transferable in all their particulars to Title VII." *Ibid.* *Meritor* therefore contemplates that, in deciding whether an employer is liable for sexual harassment in the workplace, a court should apply common law agency principles as long as they are compatible with the purposes of Title VII.[2]

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[2] Because the question of employer liability for a supervisor's harassment of a subordinate depends on an interpretation

2. The Restatement (Second) of Agency (1958) sets forth several rules concerning when an employer is liable for the torts of his servants. It states that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment." *Id.* § 219(1), at 481. When the servant acts outside the scope of employment, the master is not liable unless (a) "the master intended the conduct or the consequences," (b) "the master was negligent or reckless," (c) "the conduct violated a non-delegable duty of the master," or (d) "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Id.* § 219(2), at 481.

a. The application of those common law agency principles has not proven difficult in cases involving quid pro quo harassment. The courts of appeals have generally agreed that an employer is liable when a supervisor engages in quid pro quo harassment. *Jansen* v. *Packaging Corp. of Am.*, 123 F.3d 490, 495 (7th Cir. 1997) (en banc), petition for cert. pending, No. 97-569; *Davis* v. *City of Sioux City*, 115 F.3d 1365,

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of the term "agent" in Title VII, it is a question of federal law; it does not depend on the vagaries of state agency law. See *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 740-741 (1989) ("[W]hen we have concluded that Congress intended terms such as 'employee,' 'employer,' and 'scope of employment' to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms."). To defer to state law definitions "could introduce striking geographical disuniformities." *Jansen* v. *Packaging Corp. of Am.*, 123 F.3d 490, 506-507 (7th Cir. 1997) (Posner, C.J., concurring and dissenting), petition for cert. pending, No. 97-569.

1367 (8th Cir. 1997); *Nichols* v. *Frank*, 42 F.3d 503, 513-514 (9th Cir. 1994); *Bouton* v. *BMW of N. Am., Inc.*, 29 F.3d 103, 106-107 (3d Cir. 1994); *Karibian* v. *Columbia Univ.*, 14 F.3d 773, 777 (2d Cir.), cert. denied, 512 U.S. 1213 (1994); *Sauers* v. *Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman* v. *Allied Signal, Inc.*, 970 F.2d 178, 185-186 (6th Cir.), cert. denied, 506 U.S. 1041 (1992); *Steele* v. *Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989).

For example, if a supervisor fires an employee because she refuses to submit to an advance, the employer is liable, without regard to whether the employer knew or should have known about the harassment, and without regard to whether the employer had a policy prohibiting such conduct. Because the harasser is able to fire the employee only because the employer has delegated to him the authority to do so, the supervisor is necessarily "aided in accomplishing the tort by the existence of the agency relation." Restatement, *supra*, § 219(2)(d). And since that ground for imposing liability depends on the agent's abuse of delegated powers and not on the employer's own "inten[t]" or "negligence" (§ 219(2)(a) and (b)), neither the employer's lack of knowledge about the harassment nor the employer's failure to authorize such conduct can relieve the employer of liability.

That principle is not unique to discrimination that takes the form of sexual harassment. It has long been established that, when a supervisor refuses to hire or discharges an employee on the basis of race or sex, that act is attributed to the employer, regardless of that employer's policies. *Long* v. *Eastfield College*, 88 F.3d 300, 306-307 (5th Cir. 1996); *Shager* v. *Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990); *Flowers* v.

Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977); *Anderson* v. *Methodist Evangelical Hosp., Inc.*, 464 F.2d 723, 725 (6th Cir. 1972). There is no basis for applying a different rule to discrimination that takes the form of sexual harassment.

b. The courts of appeals have also agreed on the appropriate standard of employer liability for co-worker harassment. In that context, employers are liable when the employer knew or should have known about the harassment and failed to take appropriate corrective action. See, *e.g.*, *Blankenship* v. *Parke Care Centers, Inc.*, 123 F.3d 868, 872 (6th Cir. 1997), petition for cert. pending, No. 97-906; *McKenzie* v. *Illinois Dep't of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996); *Karibian*, 14 F.3d at 780; see also 29 C.F.R. 1604.11(d) (in cases involving "fellow employees," the employer is responsible for acts of sexual harassment when it "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action"). Because co-workers have not been delegated authority to act on behalf on the employer vis-a-vis their fellow employees, sexual harassment by such co-workers cannot be aided by an agency relationship with the employer. Liability therefore depends on whether the employer itself is "negligent or reckless," see Restatement, *supra*, § 219(2)(b), and negligence or recklessness is shown when the employer knew or should have known about the harassment and failed to take appropriate corrective action.

c. Those areas of agreement point the way to the correct approach for deciding when an employer is liable for a hostile work environment created by a supervisor. If the supervisor is aided by the agency relationship in creating the hostile work environment, the employer is liable without more. If the supervisor is not aided by the agency relationship, and instead simply takes advantage of his proximity to an employee in the same way that a co-worker could, liability would depend on whether the employer knew or should have known about the harassment and failed to take appropriate corrective action. See *Torres* v. *Pisano*, 116 F.3d 625, 633-634 (2d Cir. 1997), cert. denied, No. 97-578 (Dec. 1, 1997); *Harrison* v. *Eddy Potash, Inc.*, 112 F.3d 1437, 1445-1446 (10th Cir. 1997), petition for cert. pending, No. 97-232; *Karibian*, 14 F.3d at 780.[3]

The court of appeals in this case purported to follow those general agency principles. Pet. App. 7a-8a. As we explain below, however, it adopted the wrong legal standards for deciding those issues.

B. The Court Of Appeals Applied The Wrong Legal Standard In Finding That The Harassment Of Petitioner Was Not Aided By An Agency Relationship With Respondent

1. The court of appeals in this case recognized (Pet. App. 10a) that, under common law agency principles, an employer is liable for a supervisor's creation of a hostile work environment when the supervisor is aided by his agency relationship in creating that environment. The court apparently concluded, however, that a supervisor is "aided" in the relevant sense only when the supervisor actually

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[3] When sexual harassment is intended solely to further private aims, rather than a purpose of the employer, it is outside the scope of employment. Restatement, *supra*, § 228(1), at 504. In circumstances in which the harassment is intended in part to further a purpose of the employer, the employer could be liable on a scope-of-employment theory as well.

threatens or imposes adverse employment consequences. *Id.* at 13a. Finding no evidence that Terry or Silverman threatened or imposed adverse employment consequences on petitioner, the court concluded that their harassment of petitioner was not aided by their agency relationship with respondent. *Id.* at 12a-14a. Agency principles are not so restrictive.

The threat or imposition of adverse employment consequences is one way in which a supervisor may abuse his delegated authority in harassing a subordinate. See *Martin* v. *Cavalier Hotel Corp.*, 48 F.3d 1343, 1352-1353 (4th Cir. 1995) (supervisor allegedly told subordinate that if she failed to submit to him she would lose her job); *Karibian*, 14 F.3d at 776 (supervisor told subordinate that she "owed him" for all that he had done for her as a supervisor, and varied her raises, hours, autonomy, and flexibility according to her responsiveness to his sexual demands); *Sparks* v. *Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1560 (11th Cir. 1987) (supervisor repeatedly reminded his subordinate that he could fire her if she refused his advances). As cases in the courts of appeals illustrate, however, the threat or imposition of adverse employment consequences is not the only way in which a supervisor may abuse his supervisory authority.

For example, in *Harrison*, an underground foreman repeatedly ordered one of his subordinates to accompany him to isolated areas in a mine, where he would then sexually abuse her. 112 F.3d at 1440-1441. Because the employer's delegation of authority to the supervisor to control his subordinates' work assignments aided in the accomplishment of the harassment, the employer was potentially subject to liability, without regard to whether the employer knew or should have known about the sexual abuse. *Id.* at

1445-1446, 1451. Similarly, in *Tomka* v. *Seiler Corp.*, 66 F.3d 1295, 1306-1307 (2d Cir. 1995), a plaintiff alleged that, while they were traveling on business, her supervisor required her to attend a dinner that he described as a business meeting, pressured her to conform to corporate culture by drinking, and then sexually abused her. Because, under plaintiff's allegations, the supervisor had used his supervisory authority to create the circumstances that made the abuse possible, the employer was potentially subject to liability. *Ibid.* Those cases provide concrete examples of why the court of appeals in this case erred in making the threat or imposition of adverse employment consequences a prerequisite to finding that a supervisor has been aided by his agency relation in harassing a subordinate.

More generally, the court of appeals' threat requirement ignores the workplace reality that "a supervisor, by virtue of his position in a hierarchy, always possesses a degree of leverage over a supervisee." *Jansen*, 123 F.3d at 497 n.4 (Flaum, J., concurring). Even when a supervisor refrains from reminding a subordinate that he has the authority to impose adverse employment consequences, an employee is bound to be aware of that fact. *Id.* at 512 (Posner, C.J., concurring and dissenting). The employee may also have reason to believe that the supervisor is more highly valued by the employer, and that, as a consequence, any complaint she files with the employer may endanger her employment status rather than his. *Ibid.* Given that workplace reality, in some instances, a supervisor bent on exploiting his authority over his subordinates may have no need to utter concrete threats about adverse employment consequences. That may be particularly true when there is an exten-

sive delegation of authority or when an employer does not have an effective policy against sexual harassment. As the EEOC has stated in its Policy Guidance on Current Issues of Sexual Harassment, "[a] supervisor's capacity to create a hostile environment is enhanced by the degree of authority conferred on him by the employer." EEOC Compl. Man. (CCH) ¶ 3114, at 3280 (Mar. 19, 1990) (EEOC Policy Guidance). And, depending on the circumstances, "in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management." *Ibid.*[4]

Those considerations suggest that the inquiry into whether a supervisor has been aided by his agency status should not focus solely on whether the supervisor has threatened or imposed adverse employment consequences, or on whether a supervisor has used his supervisory authority to direct an employee to a place where she is in a vulnerable position. When those facts are not present, a court should also inquire into whether, in light of the employer's practices and the supervisor's conduct, an employee would reasonably fear that adverse employment consequences will result if she resists or complains. When the employer's practices and the supervisor's conduct reasonably have led an employee to fear that adverse employment consequences will result if she resists or complains, a supervisor has been sufficiently "aided" by his agency status to subject the employer to liability under common law principles of agency.

The inquiry we propose is necessarily fact-intensive, and a wide variety of circumstances may be relevant, including the extent of the delegation of authority, the effectiveness of any employer policy against harassment, whether the harassment occurred during the course of supervision, and the past actions of the supervisor. Ultimately, when a supervisor has not threatened or imposed adverse employment consequences, and has not used his supervisory authority to direct an employee to a place where she is in a vulnerable position, the plaintiff must establish two elements to impose liability on the employer: First, that she feared adverse employment consequences if she resisted or complained; and, second, that her fear was objectively reasonable in light of the supervisor's conduct and the employer's practices. The findings on those two elements should be made by the district court, subject to review for clear error, or by a jury, subject to review for sufficiency of the evidence.

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[4] The EEOC has provided guidance on the elements of an effective policy against sexual harassment:

> An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

EEOC Policy Guidance, *supra*, ¶ 3114, at 3282 (citation omitted).

2. Application of that approach is consistent with the purposes of Title VII. One major purpose of Title VII is to provide a "spur" or a "catalyst" for an employer to eliminate discrimination from its workplace. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). Holding an employer liable when a supervisor is aided in the harassment of a subordinate by the employer's delegation of authority in the sense we have described provides just such a catalyst. When an employer knows that it will be liable if that authority is misused, the employer has a strong incentive to formulate the kind of hiring practices, training methods, review processes, complaint procedures, and disciplinary measures that are best calculated to prevent sexual harassment from occurring or recurring. Indeed, one of the principal stated justifications for the common law rule imposing liability on employers for the acts of their agents without regard to employer fault is that it induces employers to intensify their efforts to prevent their agents from causing harm. James, *Vicarious Liability*, 28 Tul. L. Rev. 161, 168 (1954). That justification is particularly persuasive here, in light of the statutory purpose just described.

A second major purpose of Title VII is to compensate the victims of discrimination. *Albemarle*, 422 U.S. at 418. With the enactment of the Civil Rights Act of 1991, which authorizes compensatory damages for intentional violations of the Act, 42 U.S.C. 1981a(b), that purpose has assumed increased significance in cases of sexual harassment. The 1991 Act evidences Congress's view that the victims of sexual harassment should be compensated "for the terrible injury to their careers, to their mental, physical, and emotional health, to their self-respect and dignity,

and for other consequential harms." 137 Cong. Rec. 30,661 (1991) (section-by-section analysis of Rep. Edwards). Recognition of an employer's liability for harassment that has been aided by the agency relationship in the sense we have described is consistent with that goal as well. One of the reasons the common law holds employers liable for the wrongdoing of agents who abuse their authority is to ensure that the victims of wrongful conduct do not go uncompensated. James, 28 Tul. L. Rev. at 169-170; *Prosser and Keeton on the Law of Torts* 500-501 (W. Page Keeton ed., 5th ed. 1984). The common law approach rests on the view that, because the employer has sought to profit through the use of agents, the employer, rather than the innocent victim, should bear the costs when those agents abuse their delegated authority and cause injury. *Ibid.* That common law rationale is fully applicable here.

3. Under the correct approach to employer liability, the district court's subsidiary findings could support a finding that Terry's and Silverman's harassment of petitioner was aided by their agency relationship with respondent. The district court found that respondent gave Terry and Silverman broad authority over petitioner's terms and conditions of employment. Pet. App. 92a-93a. Terry was authorized to supervise all aspects of petitioner's work and to give her oral and written reprimands, and Silverman supervised petitioner's daily duties and designated work and shift assignments. *Id.* at 92a. Terry's and Silverman's authority over petitioner was further enhanced by the remote location, where lifeguards had almost no contact with anyone higher than Terry in the chain of command. *Id.* at 3a, 93a. The district court also found that respondent did not have an effective policy

against harassment. *Id.* at 83a. While respondent had a written policy against sexual harassment, Terry and Silverman were not even aware that it existed, and there was "a complete failure" to disseminate the policy to marine safety section employees. *Ibid.*

In essence, then, the district court found that respondent gave Terry and Silverman virtually unchecked authority over petitioner in a remote location, and failed to provide an effective avenue for seeking redress against sexual harassment. Pet. App. 82a-84a. Given the inherent leverage that Terry and Silverman possessed over petitioner, those facts could support a finding that petitioner reasonably feared that there would be adverse employment consequences if she resisted or complained.

We do not, however, urge the Court to affirm the district court's finding of liability against respondent on that basis. As we have stated, the inquiry into whether a subordinate reasonably feared adverse employment consequences if she resisted or complained is ultimately a factual one. And while the district court found that Terry's and Silverman's harassment of petitioner was aided by their agency status, it did not resolve that issue in accordance with the legal standard we have proposed. See Pet. App. 92a-93a. That issue should therefore be remanded to the district court for a determination under the correct legal standard.

C. The Court Of Appeals Applied The Wrong Legal Standard For Determining When A Supervisor's Knowledge Of Harassment Can Be Imputed To An Employer

As previously discussed, even if a supervisor's harassment of a subordinate is not aided by an agency relationship, an employer is still liable if the employer knew or should have known about the harassment and failed to take appropriate corrective action. See also *Bouton*, 29 F.3d at 106; *Davis*, 115 F.3d at 1367-1368; *Nichols*, 42 F.3d at 508. The district court found that one of respondent's supervisors, Robert Gordon, actually knew about the harassment of petitioner, and that Gordon's knowledge could be imputed to respondent. Pet. App. 93a. The court of appeals held, however, that Gordon's knowledge could not be imputed to respondent because, in its view, only the knowledge of high-level management may be imputed to an employer and Gordon was not a member of high-level management. *Id.* at 15a. The court of appeals also refused to impute Gordon's knowledge to respondent because Gordon had learned about the harassment in his capacity as a friend rather than in his capacity as a supervisor. *Id.* at 15a n.9. The court of appeals too narrowly defined the circumstances in which the knowledge of a supervisor may be imputed to an employer.

The determination of when an agent's knowledge of harassment may be imputed to an employer should be guided by general principles of agency law. *Meritor*, 477 U.S. at 72. Under general agency principles, the knowledge imputed to an employer is not limited to what is known by high-level management. Instead, the knowledge of an employer's agent is imputed to the employer whenever the agent has a duty to report

the information to the employer. See Restatement, *supra*, § 272, at 591 ("[T]he liability of a principal is affected by the knowledge of an agent concerning a matter as to which * * * it is his duty to give the principal information."); *id.* § 275, at 598 ("[T]he principal is affected by the knowledge which an agent has a duty to disclose to the principal or to another agent of the principal to the same extent as if the principal had the information.").

Consistent with that general principle, an agent's knowledge of sexual harassment may be imputed to the employer when the agent's job duties require that he stop the harassment or pass on the information about the harassment to someone who can. *Young* v. *Bayer Corp.*, 123 F.3d 672, 674-675 (7th Cir. 1997). Knowledge may also be imputed when one of those two duties exists by virtue of "general norms of management" (*ibid.*)—including the agent's responsibilities to the employer with respect to other violations of applicable legal requirements occurring on the job. Thus, when the person with knowledge is the harasser's supervisor, knowledge will be imputed to the employer. General norms of management would require the supervisor to halt such harassment. See *Torres*, 116 F.3d at 637 & n.16. When the person with knowledge supervises the *harassee*, but not the harasser, knowledge may be imputed when the "supervisor was empowered (that is, charged with a duty) to protect the harassee from further harm." *Id.* at 637 n.16. The court of appeals therefore erred in holding that, as a matter of law, Gordon's knowledge could not

be imputed to respondent because Gordon was not a member of high-level management.[5]

Nor is it controlling that Gordon acquired the information in his capacity as a friend rather than as a supervisor. Under general agency principles, "[e]xcept for knowledge acquired confidentially, the time, place, or manner in which knowledge is acquired by a servant or other agent is immaterial in determining the liability of his principal because of it." Restatement, *supra*, § 276, at 602. The relevant inquiry is therefore not whether Gordon received the information as a friend or as a supervisor, but whether he received it in confidence.

Thus, Gordon's knowledge should be imputed to respondent if (1) Gordon had a duty to disclose his knowledge about Terry's and Silverman's sexual harassment to an official who could stop it, and (2) Gordon did not receive the information in confidence. Because neither the district court nor the court of appeals addressed those issues, the question whether Gordon's knowledge of the harassment may be imputed to respondent should be remanded for further proceedings.

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[5] Under general agency principles, an agent's knowledge that he has personally engaged in wrongdoing may not be imputed to the employer. Restatement, *supra*, § 280, at 609. Thus, Terry's and Silverman's knowledge of their own wrongdoing may not be imputed to respondent. When a proprietor, partner, or corporate officer personally participates in the harassment, that conduct would be attributed to the employer. *Andrade* v. *Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996).

D. The Court Of Appeals Erred In Failing To Remand To The District Court The Question Whether Respondent's Failure To Disseminate Its Policy Against Harassment Warranted A Finding That Respondent Should Have Known About The Harassment Of Petitioner

In deciding whether an employer should have known about harassment, one relevant inquiry is whether the employer exercised reasonable care to ensure that it would learn about harassment if it occurred. Restatement, *supra*, § 219(2)(b) (employer is liable for its own negligence). Respondent failed to take such reasonable steps here. The district court found that there was a complete failure by respondent to distribute its sexual harassment policy, potentially leaving petitioner and other female lifeguards subject to harassment without an effective avenue of complaint, and leaving supervisor Gordon with the belief that respondent simply did not care about sexual harassment. Pet. App. 82a-84a.

In many workplaces, the danger of sexual harassment is sufficiently foreseeable that an employer that fails to develop an effective policy against harassment, including an effective complaint mechanism by which victims can obtain relief without fear of retaliation, risks a finding that it has been negligent. See *Jansen*, 123 F.3d at 510-511 (Posner, C.J., concurring and dissenting). Respondent, in particular, should have been aware of the need for an effective policy. Given the formerly all-male character of the lifeguard staff, the small number of female lifeguards, the nature of lifeguard work, and the sharing of locker rooms and showers, Pet. App. 72a, the potential for sexual harassment should have been apparent. Respondent's failure to implement an effective policy against harassment reflects a basic failure to exercise reasonable care.

The court of appeals discounted the significance of the ineffectiveness of respondent's policy on the ground that the district court did not find that respondent would have known about the harassment even if it had effectively disseminated the policy. Pet. App. 17a n.11. The court also stated that "the record indicates that failure to disseminate th[e] policy was not the reason why [respondent] did not know about the harassment." *Ibid.*

The court of appeals provided no explanation, however, for its conclusion that an effective policy would not have resulted in respondent's learning about the harassment. That failure is particularly glaring because Terry's and Silverman's harassment occurred over a period of years and affected numerous female lifeguards besides petitioner. Pet. App. 73a-79a. A report by one or more of those other lifeguards might well have led to the detection of the harassment of petitioner, and a report by petitioner or Gordon certainly would have given respondent such knowledge. In light of those potential sources of information, the appellate court's unsupported statement that the record indicates that an effective policy would not have made a difference is insufficient and unpersuasive.

More fundamentally, when a district court fails to make a finding on a dispositive factual issue, the appropriate course for an appellate court is to remand to the district court for resolution of that factual issue. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-293 (1982). An appellate court should not ordinarily undertake to resolve the issue itself based on its view of what the record "indicates." *Ibid.* Since the record here would be consistent with a contrary

finding, the court of appeals erred in deciding for itself that respondent's failure to disseminate its policy was not the reason that respondent did not know about the harassment, rather than remanding that issue to the district court. The district court should now be permitted to decide that issue in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted.

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BRIEF *AMICI CURIAE* OF NATIONAL WOMEN'S LAW CENTER, EQUAL RIGHTS ADVOCATES and WOMEN'S LEGAL DEFENSE FUND ON BEHALF OF PETITIONER

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BRIEF *AMICI CURIAE* OF NATIONAL WOMEN'S LAW CENTER, EQUAL RIGHTS ADVOCATES and WOMEN'S LEGAL DEFENSE FUND ON BEHALF OF PETITIONER

INTERESTS OF *AMICI CURIAE*

Amici curiae are organizations strongly committed to achieving equality for women, and each has an abiding interest in ensuring the sound interpretation and application of the provisions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, which protect against sexual harassment in the workplace. Descriptions of the individual organizations are set forth in the attached appendix.[1]

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1 The parties' written consent to the filing of this brief has been filed with the Court. No counsel for any party authored this brief in whole or

STATEMENT OF THE CASE

Amici adopt the Petitioner's Statement of the Case for purposes of this brief.

SUMMARY OF ARGUMENT

In this brief, *amici* advocate a standard of employer liability that is supported by agency principles and best comports with the realities of sexual harassment in the workplace. Specifically, this brief argues that agency principles support holding employers liable for sexual harassment where a supervisor invokes the employer's authority, either implicitly or explicitly, to sexually harass subordinate employees. Title VII also mandates holding employers liable for sexual harassment if they have failed to provide a meaningful avenue for complaints of sexual harassment. The existence of a policy prohibiting, and procedures for reporting, sexual harassment alone will not immunize an employer, however, where agency principles still require a finding of liability.

I. INTRODUCTION

As this Court has repeatedly recognized, sexual harassment is a form of sex discrimination that negatively affects women's ability to achieve workplace equality.[2] As the Court stated in *Harris v. Forklift Systems, Inc.*:

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in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

2 *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); *see also Franklin v. Gwinnett County Pub.*

> A discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers . . . . [T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender . . . offends Title VII's broad rule of workplace equality.

Id. at 22.

Sexual harassment constitutes precisely the kind of "artificial, arbitrary, and unnecessary barriers to employment" that Title VII was intended to prevent.[3] Title VII "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," including sexual harassment in the workplace. *Harris*, 510 U.S. at 21, (*quoting Meritor*, 477 U.S. at 64). In enacting Title VII, Congress intended to eradicate discrimination from the workplace and made a clear policy decision that the employer is in the best position to prevent discrimination from occurring. *See Horn v. Duke Homes, Inc.*, 755 F.2d 599, 605 (7th Cir. 1985). In addition, Title VII seeks to compensate the victims of discrimination for their injuries by imposing liability on employers for the discriminatory acts of their employees. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

Schs., 503 U.S. 60 (1992) (recognizing sexual harassment of student by teacher as form of unlawful sex discrimination).

3 *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

To make Title VII's promise of workplace equality meaningful, this Court should adopt a standard of employer liability which brings the full protection of the law to bear on sexual harassment in the workplace. In *Meritor*, this Court recommended looking to traditional principles of agency for guidance on the standards for employer liability. *Meritor*, 477 U.S. at 72.

In formulating the standard of employer liability for sexual harassment by a supervisor, the Court should draw on common law agency principles, as set forth in the *Restatement (Second) of Agency*, the public policies underlying Title VII, and the considerable scholarly research available which illuminates the causes and effects of, as well as the proven methods to prevent, sexual harassment in the workplace. This inquiry requires the adoption of a legal standard that holds employers liable when the harasser draws on authority delegated by the employer to sexually harass subordinate employees, or when the employer fails to prevent or respond to sexual harassment.

Specifically, employers should be liable for hostile work environment sexual harassment where (1) a supervisor explicitly or implicitly invokes the employer's authority to sexually harass subordinate employees; or (2) even if the harasser did not act as the employer's agent, the employer knew or should have known of the harassment and failed to take appropriate action. In applying the second principle, an employer should be deemed to have constructive knowledge of the harassment if it failed to develop and disseminate a policy against harassment or failed to provide to all employees a meaningful avenue for complaining of sexual harassment.

The Eleventh Circuit decision below fails to apply these principles properly. Its decision would effectively shield employers from liability for the acts of their supervisors and impose liability only on employers who knew or should have known of the hostile environment, thus treating sexual harassment by a supervisor the same as sexual harassment by co-workers. Even with regard to the "knew or should have known" standard, the court construed notice too narrowly. The court's overly restrictive test is at odds with traditional principles of agency and imputed corporate knowledge. *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1539 (11th Cir. 1997) (Barkett, J., concurring in part and dissenting in part). This brief first discusses traditional agency principles, which, contrary to the Eleventh Circuit's decision, require that the employer be liable in the instant case. The brief then discusses the independent ground for liability where, as here, the employer did not provide a meaningful avenue for redress to harassed employees.

II. EMPLOYERS SHOULD BE LIABLE FOR SEXUAL HARASSMENT WHERE A SUPERVISOR INVOKES THE EMPLOYER'S AUTHORITY, IMPLICITLY OR EXPLICITLY, TO SEXUALLY HARASS SUBORDINATE EMPLOYEES

When a supervisor abuses the day-to-day power over the workplace given to him or her by the employer and sexually harasses subordinate employees, the employer should be liable. Traditional agency principles and Title VII's statutory scheme require that result for all types of sexual harassment cases, whether hostile work environment or *quid pro quo*.

A. Agency Principles Support Holding Employers Liable For The Explicit Or Implicit Use By Supervisors Of Their Authority To Sexually Harass Employees

There is nothing novel about the proposition that employers should be liable for the acts of their supervisory employees. Employers function in the workplace through their supervisors, to whom employers grant broad power over subordinate employees. Employers vest supervisors with significant control over the decisions to hire, fire, promote, discipline, and control the work environment. Supervisors typically assign work to employees, oversee that work, provide and interpret workplace rules, evaluate and report on employee performance, mediate interactions between employees, and grant sick and annual leave and overtime pay. *See Meritor*, 477 U.S. at 76 (Marshall, J., concurring) (a "supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees;" rather, they are "charged with the day-to-day supervision of the work environment . . ."). In short, supervisors are responsible for many of the workplace decisions, both formal and informal, that determine an employee's success and advancement on the job.[4] Because of the control supervisors have over the workplace, sexual harassment by supervisors in the course of supervising employees will rarely occur independent of the

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4 Thus, sexual harassment can exacerbate other impediments to the advancement of women into high level management positions, such as exclusion from training, mentoring relationships, informal networks and other career development opportunities important for employee development. Federal Glass Ceiling Commission, *Good For Business: Making Full Use of the Nation's Human Capital* (1995).

supervisors' authority as agents of the employers. *Meritor*, 477 U.S. at 77.

When supervisors wield the broad authority granted by the employer to sexually harass subordinate employees, they act as agents of the employer. Common law agency principles require imposing liability on employers for the sexual harassment of their supervisors in such cases. The supervisor *is* the employer, and the employer is therefore liable for the acts of the supervisor even if the employer did not have notice of them. Many cases after *Meritor*, which have addressed the issue of employer liability for hostile environment sexual harassment by a supervisor, have relied on Section 219(2)(d) of the *Restatement (Second) of Agency*[5] to hold employers liable for precisely this reason.[6] For example, the Tenth Circuit in *Harrison v. Eddy Potash, Inc.*, held the employer responsible for the discriminatorily abusive hostile work environment created by a supervisor who capitalized on and abused his delegated authority. 112 F.3d at 1446. As the court recognized, the employer was

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5 *Restatement (Second) of Agency* § 219(2)(d) (1958) provides that "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . . (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

6 *See, e.g., Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1446 (10th Cir. 1997), *petition for cert. filed* (Aug. 6, 1997); *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557-60 (11th Cir. 1987). *Cf. Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1352 (4th Cir. 1995) (finding employer liable in constructive discharge case because supervisor "used [actual and apparent] authority to accomplish" harassment).

liable, despite having had no notice of the problem, because it had conferred on the supervisor actual and extensive power over his subordinates in the workplace, which the supervisor abused.[7] Thus, the supervisor was "'aided in accomplishing the harassment by the existence of the agency relationship.'"[8]

To hold an employer liable for its supervisors' abuse of delegated authority is also consistent with both the EEOC Guidelines and the EEOC's subsequent Policy Guidance on Sexual Harassment.[9] The EEOC Guidelines, as this Court recognized in *Meritor*, "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[10] The EEOC Guidelines would hold the employer liable for sexual harassment by its supervisors, "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." 29 C.F.R. § 1604.11(c). Relying explicitly on the Restatement, the EEOC Policy Guidance states further that "'an employer also may be liable if the supervisor was aided in accomplishing

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7 The Tenth Circuit also rejected the employer's argument that it should not be liable because it had a system for processing employee complaints in place. *See* discussion *infra* at pp. 24-28.

8 *Harrison*, 112 F.3d. at 1445 (quoting *Karibian v. Columbia Univ.*, 14 F.3d at 780).

9 29 C.F.R. § 1604.11 (1997); EEOC Policy Guidance on Sexual Harassment, 8 F.E.P. Manual (BNA) 405:6681, 6699 (Mar. 19, 1990).

10 *Meritor*, 477 U.S. at 65 (*quoting General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976), *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

the tort by the existence of the agency relation.'" 8 F.E.P. Manual (BNA) at 405:6699, *citing* § 219(2)(d) of the Restatement.

Under the law of agency, where supervisors use the authority of the principal to harass their subordinates, the employer is liable, whether the harasser's use of the employer's authority is express or implied. Because the supervisors' control over the workplace is normally so complete, it is unnecessary that supervisors explicitly invoke their authority to hold the employer liable for the harassment.

Nothing in the Restatement or in the cases relying on it requires that a supervisor's use of actual or apparent authority to harass be explicit. The courts' articulation of the Section 219(2)(d) principle broadly encompasses any use of supervisory authority to harass. In *Torres v. Pisano*, 116 F.3d 625, 635 (2d Cir. 1997), *cert. denied*, 66 U.S.L.W. 3385 (1997), for example, the Second Circuit set forth the principle as follows: "[I]n order to establish liability on the theory that the supervisor exploited the agency relationship in committing the harassment, a plaintiff 'must allege facts which establish a nexus between the supervisory authority' and the harassment." The court noted that "this is not an onerous requirement." 116 F.3d at 635. Most important, the court's discussion of legal authority in support of this principle makes it clear that the supervisor need not make that nexus explicit. For example, the court in *Torres* cited with approval another Second Circuit case which found that a supervisor had used his authority to commit hostile environment sexual harassment, where he convened a business dinner, implied that employees were required to attend, fostered alcohol consumption at the dinner, and then

sexually assaulted the plaintiff.[11] Thus, even an unspoken use of authority by a supervisor to sexually harass a subordinate supports employer liability.

This case illustrates how supervisory authority can be used to facilitate and exacerbate sexual harassment. Supervisors Terry and Silverman were the highest ranking supervisors in the Marine Safety Section, located at a remote worksite far removed from the rest of the city government. They were granted "virtually unchecked authority over the work environment." *Faragher*, 111 F.3d at 1544 (Barkett, J., concurring in part and dissenting in part). As Marine Safety Chief, Terry "had the authority to supervise all aspects of the lifeguards' work assignments, to conduct counseling and oral reprimands and place reports of such disciplinary actions in the lifeguards' personnel files," and to interview and select new lifeguards, "subject to approval by higher management." *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1563-64 (S.D. Fla. 1994), *aff'd in part and rev'd in part*, 76 F.3d 1115 (11th Cir. 1996), *on reh'g, en banc*, 111 F.3d 1530 (11th Cir. 1997). Silverman, as Marine Safety lieutenant, and then captain, supervised the daily workplace environment, including work assignments and staffing of shifts, as well as the lifeguards' physical fitness routines. Together, Terry and Silverman had unfettered authority over the work environment and the supervision of their subordinate employees. *Id.* at 1564.

The sexual harassment of the female employees occurred as an integral part of this supervision. Both Terry

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11 *Torres*, 116 F.3d at 635; *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1306-07 (2d Cir. 1995).

and Silverman relied on their actual and apparent authority to create a hostile environment for Petitioner through offensive touching and remarks in the course of their supervision. Some of their use of authority to sexually harass was explicit, as evidenced by supervisor Terry's interview question to an applicant asking if she was going to "fuck" or "screw" all of the male lifeguards like the rest of the female lifeguards. 864 F. Supp. at 1557. In addition, Terry and Silverman inappropriately touched and made sexually harassing comments to Petitioner and other female lifeguards while supervising them on the job. *Id.* at 1556-58. Terry and Silverman used the authority delegated to them by the City of Boca Raton to create a hostile environment for the female lifeguards who were subordinate to them.

The realities of the workplace are such that a supervisor's sexual harassment of subordinate employees often will be furthered and exacerbated by the supervisor's very authority over the target. Sexual harassment becomes more extreme the greater the power difference between the victim and the harasser, and sexual harassment is more likely to occur when there is an imbalance of power in the workplace.[12] According to a study of Fortune 500 companies, almost two thirds of sexual harassment complaints are brought against a woman's immediate supervisor or another person with greater power.[13]

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12 *See* J. N. Cleveland and M. E. Karst, *Sexual Harassment and Perceptions of Power: An Underarticulated Relationship*, J. of Vocational Behav. at 52 (1993).

13 Ronni Sandroff, *Sexual Harassment in the Fortune 500*, Working Woman at 69, 71 (Dec. 1988).

Women are particularly vulnerable to the abuse of authority by a sexually harassing supervisor because women hold a structurally inferior place in the workforce.[14] Sexual harassment by a supervisor operates in the workplace to reinforce power and to keep women in a subordinate place. Not only does harassment have a direct effect on the working conditions and emotional health of the victim, but it also undermines her work performance and opportunities for advancement in the same way as sex discrimination in hiring, promotion and work conditions. As this Court observed in *Harris v. Forklift Systems, Inc.*, harassing conduct "can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." 510 U.S. at 22.

B. Persons Subjected To Hostile Work Environment Harassment By Supervisors Deserve The Same Level Of Protection As Persons Subjected To Other Forms Of Unlawful Discrimination Under Title VII

Principles developed in a broad range of Title VII cases further support holding employers liable for a hostile environment created by a supervisor who uses authority

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14 Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity and the Shaping of Legal Standard*, 43 Emory L. J. 151, 182-84 (1993). *See also* Matthew S. Hesson-McInnis and Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. Applied Soc. Psychol. 877, 887, 890 (1997) (female employees are more likely to experience sexual harassment in male-dominated workplaces); Barbara Gutek, *Sex and the Workplace* 150-151 (1985) (concluding that in workplace where women are numerically rare, they face even more sexual harassment than other women do).

delegated by the employer to sexually harass subordinate employees. For example, in cases involving *quid pro quo* sexual harassment, courts generally hold employers liable for the supervisor's wrongful conduct because he, "by definition, wields the employer's authority to alter the terms and conditions of employment . . . ."[15] The supervisor may abuse that delegated power either by demanding sexual favors, so-called "*quid pro quo*" harassment, or by creating a harassing "hostile environment." *Meritor*, 477 U.S. at 65-66. We submit that the policy objectives that support employer liability for *quid pro quo* harassment apply equally to hostile environment harassment where harassers use their authority to harass subordinates, implicitly or explicitly.

Modern cases addressing the question of vicarious liability for employers rely less on the distinction between the two types of harassment, and more on the policy objectives to be achieved by imposing liability on the employer. The Second and Tenth Circuits have correctly recognized that agency principles as expressed in Section 219(2)(d) of the

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15 *Karibian*, 14 F.3d at 777. Courts have been virtually unanimous in holding employers strictly liable for *quid pro quo* harassment. *See, e.g., Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 n.3 (4th Cir. 1995); *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 579 (2d Cir. 1989); *Lipsett v. University of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988); *Highlander v. K.F.C. Nat'l Mgt. Co.*, 805 F.2d 644, 649 (6th Cir. 1986); *Horn v. Duke Homes, Inc.*, 755 F.2d 599, 606 (7th Cir. 1985); *Crimm v. Missouri Pac. R.R.*, 750 F.2d 703 (8th Cir. 1984); *Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981); *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979); *but see Sims v. Brown & Root Industrial Servs., Inc.*, 78 F.3d 581 (5th Cir.) (affirming district court opinion holding employer liable for *quid pro quo* harassment only where employer had notice of harassment and failed to act), *cert. denied*, 117 S. Ct. 68 (1996). *See also Meritor*, 477 U.S. at 65 (noting with apparent approval EEOC position that *quid pro quo* harassment is properly imputed to employer).

Restatement (Second) of Agency apply equally to hold employers liable in both types of sexual harassment cases, because they involve harassment committed by a supervisor whose power to regulate the workplace environment aids in the accomplishment of the harassment.[16]

Deterrence, risk shifting, and risk spreading are generally cited as the primary policy considerations in the imposition of vicarious liability in *quid pro quo* cases.[17] Holding employers vicariously liable for supervisory harassment creates an incentive for the employer to take the strongest possible measures to prevent the hiring and retention of supervisors who engage in sexual harassment, to adopt policies to discourage harassment, and to properly train employees to avoid sexually harassing behavior. Because employers can often replace an injured employee at little cost, the employer bears little or no financial risk when an employee is sexually harassed, and therefore has little incentive to prevent harassment absent the imposition of employer liability.[18] The consideration of deterrence applies as strongly in hostile environment cases as it does in *quid pro quo* cases. In either situation, the employer is in the best position to prevent the harm from occurring because the

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16 *Harrison*, 112 F.3d at 1443; *Torres*, 116 F.3d at 635.

17 *See, e.g., Horn v. Duke Homes, Inc.*, 755 F.2d at 605 ("Sex discrimination can best be eradicated by enforcing a strict liability rule that ensures compensation for victims and creates an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and retention of sexist supervisors.").

18 David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed By Their Supervisors*, 81 Cornell L. Rev. 66, 92-94 (1989).

employer controls the workplace, selects the supervisor, and determines that supervisor's responsibilities.

Furthermore, forcing the employer to take action to prevent sexual harassment is the most cost-effective way to eliminate harassment in the workplace. As Seventh Circuit Chief Judge Richard Posner explained, "[T]he most efficient method of discouraging sexual harassment may be by creating incentives for the employer to police the conduct of its supervisory employees, and this is done by making the employer liable."[19] The employer controls the workplace and is therefore in the best position to prevent harassment.[20] The employer is also in the best position to bear the cost associated with the prevention of sexual harassment. Indeed, without imposing the cost of prevention on the employer, the victims of harassment will have to bear a disproportionate cost of their injuries.[21]

Moreover, in light of the blurred character of the line separating *quid pro quo* from hostile environment harassment, it would be inappropriate to base the standard of employer liability on any categorization between the two.[22]

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19 Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. Chi. L. Rev. 1311, 1332 (1989).

20 David Oppenheimer, *Exacerbating the Exasperating*, *supra* note 18, at 93.

21 *Id.* at 93-94.

22 *See, e.g., Karibian*, 14 F.3d at 780-81 ("It would be a jarring anomaly to hold that conduct which always renders an employer liable under a quid pro quo theory does not result in liability to the employer when that same conduct . . . is a discriminating abusive work environment"); *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 567 (7th Cir. 1997) (Wood, J., concurring and dissenting) (arguing that because

The two forms of harassment often overlap, and courts frequently analyze cases pursuant to both theories.[23] In *quid pro quo* cases, the harassing supervisors invoke their authority by conditioning the receipt of job benefits on acceptance or rejection of sexual favors. In hostile environment cases, the supervisors use their authority over the workplace to create a sexually hostile environment for subordinate employees. No principled distinction justifies holding employers liable for one and not the other.[24]

"[i]n the real world, sexual harassment does not sort itself into tidy categories," a rule imposing different standards of liability for *quid pro quo* and hostile environment harassment makes "neither legal nor practical sense"), *petitions for cert. filed* (Sept. 29 and Nov. 10, 1997); Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 834-56 (1991) (arguing that the distinction between *quid pro quo* and hostile environment harassment is more like a continuum than a divide and criticizing the rationale for applying different liability standards to the two types of harassment cases).

23 *See e.g., Carrero v. New York City Housing Auth.*, 890 F.2d at 579 ("Hostile environment and *quid pro quo* harassment causes of action are not always clearly distinct and separate. The discrimination which gives rise to them is not neatly compartmentalized but . . . the two types of claims may be complementary to one another."); *Henson v. City of Dundee*, 682 F.2d at 908 n.18 ("On a practical level, of course, there are many cases that could be characterized interchangeably as condition of work or *quid pro quo* cases."); 8 F.E.P. Manual at 6682 ("Although 'quid pro quo' and 'hostile environment' harassment are theoretically distinct claims, the line between the two is not always clear and the two forms of harassment often occur together."). Many cases involving explicit or implicit *quid pro quo* allegations have been analyzed as hostile environment cases. *See e.g., Tomka v. Seiler Corp.*, 66 F.3d at 1304-05 (supervisor convened business dinner and implied that employees were required to attend, fostered alcohol consumption at the dinner, which led to sexual assault); *Martin v. Cavalier Hotel Corp.*, 48 F.3d at 1349 (supervisor coerced plaintiff to comply with his sexual demands by telling her she would otherwise lose her job).

24 While proof issues may be somewhat different in the two types of cases, once a hostile workplace is proved and the harasser's exercise of

For reasons similar to those that support liability for *quid pro quo* harassment, employers are generally liable for discrimination by a supervisor outside the context of sexual harassment. Courts have consistently applied Title VII's statutory scheme to ensure that employers, not victims of discrimination, bear the cost of remedying and eradicating employment discrimination.[25] Applying a different rule for sexual harassment would contravene Congress' intent to strike at the entire spectrum of disparate treatment of men and women in the workplace, including a discriminatorily abusive work environment. *Harris*, 510 U.S. at 21.

There is no reason consistent with the objectives underlying Title VII for affording less protection in hostile environment cases than in other employment discrimination cases. Sexual harassment is a severe and pervasive problem that takes an enormous toll on the lives of its victims in terms

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authority is shown to have furthered the harassment, there is no justification for imposing a lesser standard for employer liability than in a *quid pro quo* case. Where, as here, the court is satisfied that the supervisors' conduct "unreasonably interfered with [plaintiff's] work performance by promoting an environment where female [employees] were considered fair game for uninvited touching and offensive remarks," and where, as here, the court finds conduct "sufficiently severe or pervasive to alter conditions" of employment and create "an abusive working environment," *Faragher*, 864 F. Supp. at 1562-63, the employer should bear the same liability for a supervisor's wrongful exercise of authority as in a *quid pro quo* case.

25 *See, e.g., Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 751-52 (3d Cir. 1990) (holding employer liable for conduct of supervisor who used his authority to create discriminatory conditions that caused plaintiff to resign); *North v. Madison Area Ass'n for Retarded Citizens*, 844 F.2d 401, 407 (7th Cir. 1988) (holding employer liable in Title VII wrongful discharge claim based on discriminatory conduct of supervisor).

of their economic, mental and physical well-being.[26] Although proof of psychological or physical injury is not required to establish a hostile environment claim, *Harris*, 510 U.S. at 22, sexual harassment in fact inflicts significant harm on victims. Studies estimate that over 90% of women who are sexually harassed suffer some emotional or psychological effects, including anxiety, depression, headaches, sleep disorders, gastrointestinal problems, nausea, lowered self esteem and sexual dysfunction.[27] Many suffer from post-traumatic stress disorder.[28] These psychological effects frequently affect work performance, job satisfaction, absenteeism, concentration, and ambition, and often lead to negative performance appraisals. Harassment frequently causes social isolation at work, including loss of informal associations with co-workers and supervisors, lack of feedback and support, and loss of information networks.[29]

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26 *See generally* Dolkart, *supra* note 14 at 186-88, 223-41.

27 Peggy Crull, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women* (1979); Louise F. Fitzgerald, *Violence Against Women in the Workplace*, Am. Psychologist 1070, 1072 (Oct. 1993); Jean A. Hamilton, *et al.*, *The Emotional Consequences of Gender-Based Abuse in the Workplace: New Counseling Programs for Sex Discrimination*, 6 Women and Therapy 155, 160 (1987); Jennifer C. Vinciguerra, *The Present State of Sexual Harassment Law: Perpetuating Post-Traumatic Stress Disorder in Sexually Harassed Women*, 42 Clev. St. L. Rev. 301, 315 (1994).

28 Fitzgerald, *supra* note 27, at 1072; Hamilton, *et al.*, *supra* note 27, at 164; Vinciguerra, *supra* note 27, at 303.

29 Gutek, *supra* note 14, at 349; Barbara A. Gutek and Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping With Sexual Harassment*, 42 J. Vocational Behav. 28, 33 (1993); Hamilton, *et al.*, *supra* note 27, at 164-69.

While it can be difficult to measure the economic losses due to sexual harassment, a Merit Systems Protection Board (MSPB) study of federal government employees found that those who were harassed lost $4.4 million in wages and 973,000 hours in unpaid leave annually.[30] Many employees who are harassed simply leave their job or request a transfer rather than endure the harassment. One study found that 42% of the victims of sexual harassment left their jobs and another 24% were fired.[31] The costs of leaving a job can be measured not only in the loss of income and seniority but in a disrupted work history, problems obtaining references for future jobs, loss of confidence and career advancement.[32] According to the MSPB, the United States government loses an estimated $327 million in two years in lost productivity and turnover as a result of sexual harassment.[33]

Title VII evinces Congress' intent that the employer, not the innocent employee, should bear these costs. Unless employers are held responsible for the acts of their agents, women will bear almost all the risk associated with sexual harassment, further exacerbating gender inequality in the workplace.

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30 U.S. Merit Systems Protections Board, *Sexual Harassment in the Federal Workplace* 26 (1995).

31 Crull, *supra* note 27 at 81; *see also* Frances S. Cole, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 Sex Roles 81, 89 (1986); Gutek & Koss, *supra* note 29, at 31.

32 Jean A. Hamilton, *Emotional Consequences of Victimization and Discrimination in Special Populations of Women*, 12 Psychiatric Clinic N. Am. 35, 161 (1989).

33 U.S. Merit Systems Protection Board, *supra* note 30, at 26.

III. EMPLOYERS SHOULD BE LIABLE WHEN THEY FAIL TO PROVIDE A MEANINGFUL AVENUE FOR COMPLAINTS OF SEXUAL HARASSMENT

A. Title VII Mandates Holding An Employer Liable For Failure To Provide A Meaningful Prevention Program And Redress Procedure

Whether or not the harasser acts as the employer's agent, the employer should be liable where it knew or should have known of the harassment but failed to take appropriate action to stop the harassment.[34] Because of the pervasiveness of sexual harassment in the workplace, an employer that failed to put in place an effective and meaningful procedure for handling employee complaints should have known of any sexual harassment that occurs, and is thus liable for failing to take appropriate action to end it.

This rule is consistent with the position the EEOC has taken: "The Commission generally will find an employer liable for 'hostile environment' sexual harassment by a supervisor when the employer failed to establish an explicit policy against sexual harassment and did not have a reasonably available avenue by which victims of sexual harassment could complain to someone with authority to investigate and remedy the problem." EEOC Policy

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34 Courts in the wake of *Meritor* have held that a plaintiff can demonstrate that her employer had "constructive notice" of the harassment "by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Waltman v. International Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989) (*quoting Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982)).

Guidance on Sexual Harassment, 8 F.E.P. Manual (BNA) at 405:6697.

An employer that fails to establish a meaningful policy should have known of any sexual harassment occurring in its workplace because workplace sexual harassment is so pervasive and so well-documented that employers may not claim that they could not anticipate it. Unfortunately, sexual harassment is foreseeable in virtually all workplaces. Studies show that between 40 and 90 percent of women in the United States workforce have been the victims of some form of sexual harassment on the job.[35] The extent of this problem is well known both in society at large and in the legal community. As Ninth Circuit Judge Alex Kozinski recently wrote: "'It is a sobering revelation that every woman -- *every* woman -- who has spent substantial time in the work force in the last two decades can tell at least one story about being the object of sexual harassment.'"[36] Not surprisingly, the number of EEOC complaints alleging sexual harassment has risen dramatically. In 1997, the EEOC

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35 *See, e.g.*, David Oppenheimer, *Exacerbating the* Exasperating, *supra* note 18, at 91. *See also* Gutek, *supra* note 14, at 46 (survey showed 53.1% of women had experienced sexual harassment); U. S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace – Is it a Problem?* (1981) (survey of 23,000 federal employees found 42% of women reported experiencing sexual harassment); U. S. Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* (1988) (survey update reported no significant change); Working Women's Institute, *Sexual Harassment on the Job: Result of a Preliminary Survey*, Research Series Report No. 1 (1975) (70% of women responding said they had been sexually harassed).

36 Alex Kozinski, *Foreword* to Barbara Lindemann & David D. Kadue, *Sexual Harassment in Employment Law*, at v (1992), *quoted in* Oppenheimer, *Exacerbating the Exasperating*, *supra* note 18, at 91-92.

received 15,889 complaints of sexual harassment, up from 5,623 in 1989.[37]

Any employer that failed to establish and implement a sexual harassment policy and procedures for reporting it should therefore be unable to claim ignorance of sexual harassment in the workplace. Hence, an employer that lacks a policy against sexual harassment and a meaningful avenue of redress is liable because it has failed to take reasonable action to discover the harassment so that it could then take appropriate action to end it. Employers may not hide their heads in the sand to escape responsibility for sexual harassment in the workplace.

In addition to creating constructive notice of harassment, failure to adopt a sexual harassment policy and to provide a reasonable avenue of complaint also gives rise to employer liability because it conveys to employees the apparent authority to harass. As the Tenth Circuit observed, when an employer has no written grievance policy and procedure, "'a victim of sexual harassment will reasonably perceive her only available options to be silently acquiescing in the harassment or leaving her job.'"[38] The EEOC adopted this position in its most recent Policy Guidance: "The Commission believes that in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint

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37 EEOC Sexual Harassment Statistics FY 1991-FY 1997.

38 *Harrison v. Eddy Potash, Inc.*, 112 F.3d at 1444 (*quoting* Staszewski, *Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Sexual Harassment*, 48 Vand. L. Rev. 1057, 1090 (May 1995)).

procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management."[39]

Holding employers liable for sexual harassment when they fail to promulgate effective policies and procedures for addressing it creates appropriate incentives for employers to adopt such policies, consistent with Title VII's objective of deterring unlawful discrimination. An employer that has an effective, widely publicized program to prevent and remedy sexual harassment, is likely to have fewer incidents of harassment. Therefore, requiring employers to institute prevention regimes would help them minimize their own liability. Managers are often uncomfortable dealing with sensitive issues in the absence of a policy requiring them to do so.[40] Companies that have implemented sexual harassment training programs have been less likely to see claims develop into lawsuits.[41] The evidence also shows that policies and training programs work to discourage actionable behavior. Prevention programs, including well-communicated policies and effective training programs, are

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39 8 F. E. P. Manual at 6697.

40 B. A. Gutek and M. P. Koss, *Sexual Harassment in the Workplace and Academia* 52 (Diane K. Shrier, ed. 1996) ("It must be recognized that harassment charges are embarrassing to institutions, and administrators may wish to suppress reports even though such suppression potentially places institutions in greater jeopardy than a direct response to complaints.").

41 *See Crackdown on Sexual Harassment*, 6 C.Q. Researcher 625, 633-34 (July 19, 1996) (in survey of 456 mid-size and large companies, 8% of companies with sexual harassment training programs were sued, as opposed to 12% of those without such programs).

the single most important and effective solution to reducing sexual harassment at work.[42]

B. The Existence Of A Policy Prohibiting, And Procedures For Reporting, Sexual Harassment Alone Should Not Immunize An Employer Where Agency Principles Still Mandate A Finding Of Liability

The adoption and distribution of a sexual harassment policy and procedures for reporting it, however, should not immunize an employer from liability where agency principles support holding the employer liable.[43] Independent agency principles mandate a finding of liability where the harasser acts as an agent of the employer, or where the employer otherwise had notice of the harassment but failed to respond appropriately, even where the employer has a policy against harassment. For instance, as discussed above, Section 219(2)(d) of the Restatement makes employees liable for harassment where a supervisor is aided in accomplishing the harassment by the use of delegated authority. In addition, Section 219(1) of the Restatement makes employers liable for harassment by their agents when the agent acted within

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42 *See* J. I. Avner, *Sexual Harassment: Building a Consensus for Change*, Kan. J. L. & Pub. Pol. 57, 74 (1994); E. J. Wagner, *Sexual Harassment in the Workplace* 110, 119 (1983); *see also Panelists Say Education is Essential to Effective Harassment Prevention Policy*, 66 U.S.L.W. 2271 (Nov. 4, 1997).

43 It is quite clear that simply having a policy against discrimination, or a procedure for handling employee complaints that is unavailable or unenforced, is not sufficient. This Court squarely rejected the employer's argument in *Meritor* that because it had a grievance procedure and policy against sexual harassment, and had received no notice of the workplace problem, it should be insulated from liability. *Meritor*, 477 U.S. at 72.

the scope of his employment.[44] Other courts have properly held employers liable for hostile environment harassment where the employer had actual or constructive notice of the harassment, but failed to take proper remedial action, under Section 219(2)(b) of the Restatement.[45] A rule that immunizes employers from liability based on the mere existence of a sexual harassment policy, regardless of whether the harasser acted as an agent of the employer or whether the employer failed to respond despite notice of the harassment, would undercut the independent agency principles that both this Court and the EEOC have made clear should inform decisions regarding employer liability.

Furthermore, there are compelling policy reasons why the existence of an anti-harassment policy and a reporting procedure alone should not immunize the employer from liability. First, the liability standards should take into account the reluctance of victims to report sexual harassment, particularly where the harasser has authority over the victim. Most studies conclude that victims of sexual harassment who

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44 *See Restatement (Second) of Agency* § 219(1); *see also Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 183-84 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992). We see no merit to the interpretation of some courts that because employers generally do not intend or authorize a supervisor to harass his subordinates, supervisors who do so are acting outside the scope of their employment. *See, e.g., Gary v. Long*, 59 F.3d 1391, 1397-98 (D.C. Cir. 1995). If that were the law, it is difficult to see how any negligent or illegal activity by employees could ever be imputed to employers, because employers surely generally do not authorize unlawful behavior.

45 *See Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 199 (5th Cir. 1992); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 (8th Cir. 1994); *Lipsett v. University of P.R*, 864 F.2d 881, 901 (1st Cir. 1989); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994).

take immediate action and complain, are "the exception, not the norm."[46]

Indeed, most women endure sexual harassment rather than confront it and risk the economic and emotional peril of unemployment. "Real victims rarely tell the harasser to stop. They are often inhibited or constrained from doing so by the situation (*e.g.*, their supervisor is the harasser), or by their upbringing . . . ."[47] It has been estimated that 50% of women who experience sexual harassment each year try to ignore it or simply endure it.[48] A review of ten studies reported that only 10% to 15% of women either responded assertively to or reported their harasser; less than 10% of women in public sector jobs, manufacturing or higher education reported harassment.[49]

The reluctance of most sexual harassment victims to take a stand against their harasser's abuse is grounded in fear

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46 National Council for Research on Women, *Sexual Harassment: Research & Resources* 32 (1995).

47 Barbara Gutek, *Responses to Sexual Harassment*, in *Gender Issues in Contemporary Society* 197, 205 (Stuart Oskamp & Mark Costanzo, eds. 1993).

48 Freada Klein & Mary Rowe, *Estimating the Cost of Sexual Harassment to the Fortune 500 Service and Manufacturing Firms*, in Testimony on H.R. 1 Before the House of Representatives Committee on Education and Labor, 102d Cong., 1st Sess. 169, 209 (1991).

49 J.E. Gruber, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 Basic and Applied Social Psychology 4, at 544-45 (1995). *See also* United States Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update*, *supra*, at 23-24 (noting that the most prevalent response for female victims was to tolerate the harasser's behavior silently).

of both retaliation and loss of privacy.[50] One study reported that 95% of women who report sexual harassment express such fears.[51] The fact is, moreover, that "[s]taggering numbers of women are forced by economic reality" to put up with their harassers, upon whom they depend for their "livelihoods, their psychological well-being and self-esteem. . . ."[52]

Requiring an employer to take meaningful action to monitor and prevent sexual harassment in the workplace is necessary to ensure the fulfillment of Title VII's policy objectives. It also behooves the employer to do more than merely institute and distribute an anti-harassment policy. "Companies have available a variety of measures . . . through which they can both monitor and impact behavior patterns in the workplace. The costs of preventing future harassment essentially represent an investment in long-term freedom from liability." *Jansen*, 123 F.3d at 499 (Flaum, J., concurring).

In sum, the publication and enforcement of a policy against sexual harassment is necessary to prevent harassment but should not immunize an employer from liability for harassment that has already occurred. All employer actions, including establishing a policy against and procedure to

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50 Testimony on H.R. 1, *supra* at 172.

51 R. Sandroff, *Sexual Harassment in the Fortune 500*, *supra* note 13, at 71.

52 *Research & Resources*, *supra* note 46, at 34; *see also Nichols v. Frank*, 42 F.3d at 510 ("For economic reasons, most workers cannot simply abandon their employment -- new jobs are hard to find").

report sexual harassment, must meaningfully take into account the realities of the workplace, so that employers have incentive to minimize the incidence of harassment, and sexual harassment victims receive the full protection of the law. Finally, even if the employer has a meaningful policy and procedure, Title VII still mandates holding an employer liable where agency principles otherwise require it. Title VII's purpose of preventing and remedying discrimination will thus be effectuated.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeals for the Eleventh Circuit and remand for entry of judgment for petitioner.

Respectfully submitted,

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DECEMBER 29, 1997

APPENDIX

APPENDIX

The *National Women's Law Center* ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has worked continuously to make Title VII's promise of equality in the workplace a reality. The existence of widespread sexual harassment in employment greatly restricts the opportunity for women to participate as full partners in the workplace. The Center has a deep and abiding interest in ensuring that Title VII adequately protects women from sexual harassment in employment.

Equal Rights Advocates ("ERA") has dedicated itself for the past 23 years to achieving equality for women and girls. It has an abiding interest in ensuring the sound interpretation and application of Title VII of the Civil Rights Act of 1964, which protects against sexual harassment in the workplace. ERA has represented plaintiffs in numerous sexual harassment cases, including the first case in the Ninth Circuit to find sexual harassment a violation of Title VII, *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). In addition, ERA educates hundreds of women each year through its advice and counseling line regarding their legal right to be free from sexual harassment, conducts sexual harassment workshops for schools and non-profit organizations, and provides technical assistance to attorneys who are handling sexual harassment cases, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 1994 WL 792661 (M.D. Tenn. 1994); *Murillo v. Rite Stuf Foods, Inc.*, (Cal. App. Ct. 1997); *Rojo v.*

Kliger, 52 Cal.3d 65 (1990); *Dyna-Med v. Fair Employment & Housing Comm.*, 43 Cal.3d 1379 (1987) and *Commodore Home Systems, Inc. v. Superior Court*, 32 Cal.3d 211 (1982). In 1996, it authored an *amicus* brief in a California case, *Lai v. Prudential Insurance*, which examined the definition of supervisor for liability purposes under California's anti-discrimination statute.

The *Women's Legal Defense Fund* ("WLDF") is a non-profit, national advocacy organization founded in 1971 to advance the rights of women. WLDF promotes fairness in the workplace, quality health care, and policies that help women and men meet both work and family responsibilities. WLDF volunteer lawyers represented the plaintiff in *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), one of the first federal appellate holdings that sexual harassment may violate Title VII of the 1964 Civil Rights Act, and have participated as *amicus curiae* in every sexual harassment case that has come before the Supreme Court of the United States.

Supreme Court, U.S.
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No. 97-282

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BETH ANN FARAGHER,
Petitioner,
v.
THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-282

BETH ANN FARAGHER,
Petitioner,

v.

THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions with a total membership of approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case turns on the issue of employer Civil Rights Act Title VII[2] liability for supervisor hostile environ-

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

[2] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

ment sexual harassment addressed briefly but left largely unresolved in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69-73 (1986). That issue has, since *Meritor*, proved exceedingly troublesome to the federal courts of appeals. The result has been a plethora of lower court opinions that use a plethora of agency law terms—such as "direct" and "indirect" liability, "respondeat superior" and "apparent authority," "scope of employment" and "constructive knowledge"—in ways that give those terms a plethora of conflicting meanings, with different judge's opinions citing the same sections and subsections of the Restatement of Agency to opposite effect. *See, e.g., Huddleston v. Roger Dean Chevrolet*, 845 F.2d 900, 904 (11th Cir. 1988) ("respondeat superior" liability requires that "the employer knew or should have known of the harassment and failed to take prompt action to remedy the violation"); Pet. App. 55a (panel opinion) (same); Pet. App. 8a (en banc opinion) (an employer can be "vicariously liable" "whether or not the employer knew or should have known about the agent's wrongful act"); Pet. App. 7a-8a (en banc opinion) (characterizing "knew or should have known" liability as "direct" liability); Pet. App. 54a-56a (under agency principles, "knew or should have known" liability is " "indirect", while "the employer is directly liable for sexual harassment when the harasser is acting as the employer's agent").

The apotheosis of this intense judicial inquiry, perhaps, was the en banc consideration of the question (and related employer liability issues) by the United States' Court of Appeals for the Seventh Circuit in *Jansen v. Packaging Corporation of America*, 123 F.3d 490 (7th Cir. 1997). *Jansen* yielded seven thoughtful signed opinions for the eleven judges of that court, differing as to such basic issues as whether state or federal law applies to determine employer liability for supervisor conduct, and whether a threat to use economic power to compel acquiescence to unwelcome sexual behavior is the same or different for employer liability purposes as the actual use of such power.

In the quest for principles to govern the determination of when an employing entity must answer for the creation of sexually discriminatory working conditions affecting its employees, the lower courts have in particular disagreed on the import of this Court's limited consideration of the issue in *Meritor*. *Compare* Pet. App. 9a ("*Meritor* teaches [that] employers are not automatically liable for hostile environment sexual harassment by their supervisors or employees") with *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2nd Cir. 1995) ("In *Meritor*, the Supreme Court declined to announce a definitive rule on employer liability, holding instead that federal courts should be guided by common law principles of agency").

After briefly summarizing the reasons why hostile environment sexual harassment violates Title VII, we therefore re-examine *Meritor*, concluding that the Court in that case described in the most general of terms a method of determining whether an employer is liable for the sexually discriminatory working conditions created by particular actions of a particular supervisory employee in a particular workplace with a particular hierarchical structure. Most notably, *Meritor* dictates that this employer liability question be treated as part of the larger issue of Title VII employer liability for acts by supervisory employees; that while the common law of agency may be informative in developing appropriate employer liability guidelines, the issue is ultimately one of determining Congressional intent in crafting Title VII; and that while a generic employer liability rule for *any and all* supervisory employees is inappropriate, employers *may* in many circumstances be responsible for hostile environment sexual harassment perpetrated by supervisory employees without regard to the knowledge or approval of the harassment by any other employer representative.

Taken together those principles provide more, and different, guidance than the lower courts have in general perceived. And, applying those principles, we submit that the general approach taken by the concurring opinion

in *Meritor* is both sound and—as Justice Stevens recognized in joining both *Meritor* opinions—fully consistent with the Court's opinion therein.

As the *Meritor* concurring opinion notes, because employers act with regard to labor relations only through individual supervisors, as a general matter under Title VII employers are held responsible for unlawful discrimination by supervisors whether or not the supervisor's act is consistent with the employer's official equal employment policies. This is in full accord with the common law of agency, which recognizes that employing entities can be held responsible for actions taken within a supervisor's (or nonsupervisor's) scope of employment even if that action is contrary to the supervisor's directions and consciously unlawful. And, as the *Meritor* concurring opinion also notes, nothing in common law agency concepts supports a distinction for employer liability purposes between sexual discrimination in the form of sexual harassment by supervisory personnel charged with authority to direct employees and to oversee day-to-day working conditions, on the one hand, and sexual discrimination by a supervisor charged with the authority to make decisions with regard to discharge, promotion, or compensation, where the supervisor's decision is borne of an employee's refusal to acquiesce in the supervisor's sexual demands, on the other.

While the common law of agency is clear and uniform in these two regards and therefore provides useful guidance with respect to Congress' probable intent in enacting Title VII, the developed common law is less clear as to a third question—whether activity such as sexual harassment, presumably undertaken by supervisors for personal reasons and not to advance the employing entity's interests, is within the supervisor's scope of employment if undertaken in the course of, or incident to, the supervisor's authorized activities, including giving direction to employees and overseeing working conditions. The common law materials can properly and fairly be read as indicating that there *is* employer responsibility for such

supervisor actions. At the same time this is an area in which the common law is in flux, and therefore inconsistent from jurisdiction to jurisdiction and situation to situation.

As to this particular aspect of agency law, then, the common law guidance is unclear, and the better course is to consider the issue as a matter of Title VII substantive law. So considered, the only conclusion consistent with the language, purposes, and, as far as we are aware, the history of Title VII is that Congress did *not* intend to distinguish for any purpose, including employer liability purposes, between discriminatory actions taken out of purely personal prejudices and predilections, on the one hand, and discriminatory actions taken because of a belief that the action will economically benefit the employer on the other.

ARGUMENT

1. It is helpful to begin the task of delineating an employing entity's responsibility for sexual harassment under Title VII by recalling the substantive analysis which provides the basis for the conclusion that in certain instances abusive behavior in the workplace directed at employees of one sex because of their sex violates Title VII.

Title VII makes it an "unlawful employment practice" for an employer

> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin. [42 U.S.C. § 2000e-2(a).]

As this Court explained in *Meritor*, "[t]he phrase 'terms, conditions, and privileges' of employment evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." 477 U.S. at 64 *quoting Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978).

As such, the phrase "'is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.'" 477 U.S. at 66, *quoting Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). And, since "a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets," sexually abusive behavior directed at one sex can so "alter the conditions of employment" as to create a discriminatorily "abusive work environment," violative of Title VII. 477 U.S. at 66, *quoting Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) .

In short,

> the very fact that discriminatory conduct [is] so severe or pervasive that it create[s] a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality. [*Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993).]

Conversely, because Title VII does not outlaw harassing conduct as such, but only "discriminat[ion] against any individual with respect to his . . . conditions of employment, because of such individual's race, color, religion, sex, or national origin," discriminatorily abusive "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." 510 U.S. at 21.

Sexual harassment that reaches the level delineated in the *Meritor/Harris* standard, is, in other words, contrary to the language of, and policies underlying, Title VII for the same reason as would be the assignment of all African-American employees to work in windowless basement offices with poor lighting and inadequate, secondhand furniture, while all white employees, regardless of

position, have the preferable, outside offices with good light, new furnture and windows with views; or the provision of new Pentium-chip computers to all male clerical workers and electric typewriters to women (even with a suitable adjustment in workload); or the requirement that all black employees address the supervisor as "Mister" or "Ms" while white employees are invited to use the supervisor's first name.

In all these instances, the work environment is a discriminatory one, because the disfavored group has to endure disadvantages and distractions not endured by the favored group, and because the discrimination demeans the discriminatees as employees and as human beings, with the foreseeable result of "detract[ing] from employees' job performance, discourag[ing] employees from remaining on the job, or keep[ing] them from advancing in their careers." *Harris*, 510 U.S. at 22.

2. Under Title VII, however, unequal employment conditions based on gender—or race, or religion or national origin—are unlawful only if "an *employer* . . . discriminates." 42 U.S.C. § 2000e-2(a).

Harris is a good example of the kind of case as to which there is general agreement that it is the "employer," not someone else, that is responsible for the existence of a discriminatorily abusive work environment. Ms. Teresa Harris, the plaintiff there, worked as a manager for a company whose president, Charles Hardy, "often insulted her because of her gender and often made her the target of unwanted sexual innuendos." 510 U.S. at 19.[3] Although Ms. Harris complained to Mr. Hardy about his behavior, that behavior did not stop. We are not

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[3] The *Harris* opinion does not indicate whether an outside Board of Directors hired Mr. Hardy as company president or whether—as appears more likely—Forklift Systems is a closely held corporation that is in fact if not in legal form the sole proprietorship of Mr. Hardy. The point made in the text is that this distinction could not possibly matter for purposes of Forklift's Title VII liability.

told whether or not Mr. Hardy—or perhaps Forklift's personnel director, if the company had one—had ever promulgated a policy outlawing behavior of the kind to which Ms. Harris was subjected. But surely that would not have mattered, any more than a general policy against race discrimination would have precluded a lawsuit against Forklift had Mr. Hardy assigned offices to African-American employees and white employees on a discriminatory basis, because of a personal prejudice against African-Americans. Rather, because Mr. Hardy was, it appears, in ultimate control of working conditions for Forklift as a whole—as well as, one also presumes, in ultimate control of employee compensation and job security —ascribing the conduct to the employing entity appears unassailable, and this is so whether Mr. Hardy's conduct was based on his views of effective management or on his personal needs, predilections, and prejudices.

In *Meritor*, in contrast, the issue of employer responsibility for the discriminatorily abusive working conditions arose because the individual perpetrating the pervasive harassment was not the president of the company but a vice-president who was the manager of the bank branch at which the plaintiff worked. The branch manager had responsibility for "direct[ing] employees in their work, . . . evaluat[ing] their performances and . . . recommend[ing] personnel actions," including salary increases, bonuses, and promotions, but apparently did not have ultimate authority over compensation, promotion, or discharge. *Vinson v. Taylor*, 753 F.2d 141, 150 (D.C. Cir. 1985).

Thus, the question raised by *Meritor* was whether an employing entity that, like most larger organizations, divides up the unitary supervisory authority exercised by the chief officer of a small, closely held company so that different supervisory persons are responsible for managing different aspects of the employees' terms and conditions of employment in different functional and geographical subdivisions of the entity, can thereby escape or limit its responsibility for the working environments created by

the supervisors vested with primary, day-to-day authority over employee working conditions.

The *Meritor* Court of Appeals—without grounding its decision on the branch manager's power to influence the compensation and status of branch employees or his role as the day-to-day manager of a discrete physical workplace site—held that "employers must answer for the sexual harassment of any subordinate by *any* supervising superior." 753 F.2d at 150 (emphasis added). In so ruling, the *Meritor* Court of Appeals had this to say about "[traditional] principles of respondeat superior as they obtain in the field of torts," and about those principles' office in determining employer Title VII liability:

> Confining liability, as the common law would, to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees. [Footnote omitted.] While modern courts seem more inclined to treat intentional misconduct on the job as arising out of and in the course of the employment [footnote omitted], and thus as providing a basis for liability under a somewhat expanded theory of respondeat superior, there simply is no need to so confine either the analysis or the solution where Title VII applies. [753 F.2d at 151.]

The *Meritor* Court of Appeals thereupon held that Title VII establishes "[a] higher level of imputed responsibility than respondeat superior imposes." *Id.*

This Court, after considering the *Meritor* Court of Appeals' holding and the positions espoused by the parties and the *amici*, "declined the parties invitation to issue a definitive ruling on employer liability" because of "the state of the record in this case." 477 U.S. at 73. Rather, this Court considered the employer liability question at the most general level, holding that "the Court of Appeals was wrong to *entirely disregard* agency principles and

impose absolute responsibility on employers for the acts of their supervisors, *regardless of the circumstances of a particular case*." *Id.* (emphasis added).

Thus, the major point this Court made in *Meritor* regarding employer responsibility for the creation of a discriminatorily abusive workplace by a supervisory employee, as we understand it, is that the uncertainty within the common law of agency noted by the lower court there does not justify ignoring *entirely* the concepts developed over the years in determining the responsibility of employing entities for the acts of individuals invested with some, but not all, of the entity's authority to set and enforce the terms and conditions on which employees work.

The *Meritor* Court's caution in this regard suggests that careful attention to the particular authority vested in the supervisor in question is important in determining whether the employing entity is responsible for injuries created in the exercise of that authority. For that reason, generic rules such as the one adopted by the *Meritor* Court of Appeals, applicable to *all supervisors*, and without regard to whether or not the harassment occurred in the course of supervision, or at entirely separate times and places, are inappropriate.

At the same time, the *Meritor* Court recognized that the question of employer liability for sexual harassment by supervisory employees cannot be determined in a Title VII vacuum. Rather, that question is merely a subspecies of the question whether, and to what degree, Congress' decision to define "employer to include any 'agent' of an employer evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." 477 U.S. at 72.

Further, the *Meritor* Court advised that while "common law [agency] principles" can provide some "guidance" in determining those limits, the common law "principles may not be transferable *in all their particulars* to Title VII." 477 U.S. at 72 (emphasis added).

Finally, the *Meritor* Court specifically held that the employing entity *can* be responsible for supervisor hostile environment sexual harassment although no representative above the level of the harassing supervisor has notice of the discriminatorily abusive working conditions created by the supervisor's actions. 477 U.S. at 72 ("absence of notice to an employer does not necessarily insulate that employer from liability").

In a concurring opinion in *Meritor,* moreover, four members of the Court, believing that the employer liability question that the Court "leaves open" was in fact "properly before us," decided that question. The four concurring Justices noted, first, that "the answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer." 477 U.S. at 75 (Marshall, J., concurring). Those justices concluded that where "a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace . . . it is the authority vested in the supervisor by the employer that enables him to commit the wrong." *Id.*, at 77. Under those circumstances, the concurrence maintained, no requirement limiting employer liability to circumstances in which higher managerial personnel have notice of the abusive working environment "can coherently be drawn from the law of agency," *id.*, although "agency principles and the goals of Title VII law" do "make appropriate some limitation on the liability of employers for the acts of supervisors," *id.*

Justice Stevens, perceiving no inconsistency between this analysis and the more general guidelines drawn by the Court and agreeing with the concurrence that the employer liability issue should be addressed, joined both opinions. And, indeed, the analysis of the concurring Justices in *Meritor* is fully faithful to the general principles enunciated by the Court, and summarizes in broad outline the appropriate and—despite all the verbiage in the lower court opinions since *Meritor*—relatively straight

forward standards for determining employer liability for the creation of discriminatorily abusive workplaces by supervisor hostile environment sexual harassment.

3. First, the analysis must begin from a realistic understanding of the problem. As the concurring Justices in *Meritor* noted, except in the relatively unusual case like *Harris*, in which the discriminatee's immediate supervisor and harasser is the company president, "[a]n employer can only act through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of the corporation's board of directors." 477 U.S. at 75. *See also Horn v. Duke Homes Div. Of Windsor Mobile Homes*, 755 F.2d 599, 605 (1985) ("reification of the 'company' invites an ill-advised descent into the world of legal fiction. The 'company' is a legal form; it can 'act' only through its duly-appointed agents."); *Davis v. City of Sioux City*, 115 F.3d 1365, 1371 (8th Cir. 1997) ("A corporate or governmental entity cannot act by itself. Their personification is a legal fiction, and they can effect their goals only through their agents.")

The question, then, cannot be whether the employing entity can ever be responsible under Title VII for discriminatory actions taken by individuals employed to direct the actions of, and make decisions regarding, other employees. Given the realities just noted, if there were no such responsibility, the statute would become a dead letter. Indeed, while disparate treatment cases under Title VII typically turn on whether a particular action adversely affecting an employee was taken "because of" the employee's race or sex or religion or national origin, the relevant mindset has always been understood to be the mindset of the individuals responsible for the decisions, not the mindset of an abstraction called the "employer." *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (discussing the kind of discriminatory action prohibited by Title VII). It is for that reason that, as the concurring opinion in *Meritor* noted, "when a supervisor discriminatorily fires or

refuses to promote a black employee, that act is, without more, considered the act of the employer." 477 U.S. at 75, citing cases.

To put this another way, the key consideration for Title VII liability purposes is not the action taken, but the basis on which the action is taken. Title VII does not set standards for hiring, discharge, compensation, promotion, or any other aspect of workplace decision-making, other than the single standard that the decision-making process cannot turn on race, sex, religion, or national origin. And, in the typical disparate treatment Title VII case, the focus is on the particular intent of the responsible employer representatives, *not* on the overall employer policy regarding equal employment opportunity. Indeed, in most modern workplaces, discriminatory acts by even the highest managers are *inconsistent* with the employing entity's official policy.

While the result in such cases is not typically discussed in terms of the common law of agency, the unspoken premise is that as long as the employer representative is taking an action he or she is authorized to take—firing an employee, or determining her salary, or refusing her a promotion—the action is within the scope of that supervisor's delegated authority on behalf of the employing entity, and the supervisor therefore *is* the employer for Title VII liability purposes.

In contrast, on the view of the common law of agency discussed by the *Meritor* Court of Appeals and adopted by the court below and applied in this case, a discriminatory discharge or discriminatory failure to promote case would turn not on the intent of the employer representative who actually took the action, but on the intent of the individual or individuals at the highest level of management in setting policy on the kind of decision in question. To paraphrase *Vinson v. Taylor*, 753 F.2d at 151, on that view of the common law of agency concerning employer liability for actions taken by supervisors

within the scope of their employment, "[c]onfining liability, as the common law would, to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow [discriminatory economic decisions affecting employees]." *See* also Pet. App. 9a ("illegal [discriminatory discharges or other economic decisions] is an illegitimate corporate activity, beyond the scope of the supervisor's employment."); *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) (same).

But on the general—and critical—point whether an employing entity can be liable for acts taken by its supervisory employees that are against official company policy, the "guidance" (*Meritor*, 477 U.S. at 72) provided by common law doctrine is quite the *contrary* to that suggested by the *Meritor* Court of Appeals and applied by the Court of Appeal in this case. Since the nineteenth century, the developed doctrine governing the liability of employing entities to third parties for torts of the entity's employees has recognized that the concept of delegated authority cannot be defined so narrowly that the employing entity is insulated from responsibility whenever its employees fail to live up to the entity's official rules of conduct. For any such delegated authority concept would absolve enterprises of the costs of injuries that are fully foreseeable risks of running an enterprise, and that should be borne by the entity rather than by the injured person:

> It is probably true that before the nineteenth century the master was not normally responsible for the uncommanded acts of the servant . . . However, with the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those working . . . for [its] benefit. [Restatement of the Law of

> Agency 2d (1958) ("Restatement"), § 219, Comment (a)].

Consequently, the clear understanding of modern agency law is that "An action, although forbidden, or done in a forbidden manner, may be within the scope of employment," and that "An act may be within the scope of employment although consciously criminal or tortious." Restatement §§ 230, 231. Indeed, the very concept of "scope of employment" has little content *other* than as a "bare formula to cover the unordered and unauthorized acts for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not." Prosser & Keeton, *The Law of Torts*, Fifth Edition, 1984, at 502.

The concurring opinion in *Meritor*, then, is quite correct in its understanding that the most relevant guidance that "can coherently be drawn from the law of agency" (477 U.S. at 77), like the guidance that can be drawn from Title VII itself, *supports*, as a general matter, responsibility by employing entities for discriminatory acts by management representatives without regard to whether those acts violate official policy, or whether higher levels of management are aware of, or ratify the discrimination.

Similarly, there is nothing in agency concepts that justifies a distinciton between sexual discrimination in the form of sexual harassment by supervisory personnel charged with the authority to direct employees and to oversee day-to-day working conditions and sexual discrimination by a supervisor charged with the authority to make final decisions with regard to discharge, promotion, or compensation, where the supervisor's decision is borne of an employee's refusal to acquiesce in the supervisor's sexual demands. *Compare, e.g., Jansen, supra*, 123 F.3d at 512 (Posner, J., concurring) (distinguishing, albeit not on general agency law grounds, employer liability for completed "company acts" such as transfers, raises, and promotion, from liability for supervisory actions that do not have such a direct economic impact.)

The "scope of employment" concept is a general one that applies in the same way to each of the various kinds of authority that an employing entity can grant to its supervisors to control some basic aspect of the work lives of the entity's employees. Put another way, agency law does not cut off employer responsibility for the acts of supervisory employees at some level in the management hierarchy or limit that responsibility to supervisory employees with authority over a specific aspect of employees' work lives. Rather, traditional agency law holds the employer liable for actions taken within the area that is delegated, whatever that area may be.[4] Any other approach, indeed, would absolve the entity entirely of responsibility for actions taken by those assigned authority to set or enforce rules governing the day-to-day working environment. *Cf.* 29 U.S.C. § 152(11) (supervisors for purposes of the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*, include individuals with any one of a range of "authority, in the interest of the employer," including, co-equally, the authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or *responsibility to direct them or to adjust their grievances*, or effectively to recommend such action. . . ."

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[4] The reason that employers are not necessarily responsible for the harassing acts of an employee's co-employees is not that co-employees are not covered by the "scope of employment" concept, but that a co-employee's scope of employment does *not* include authority to determine the working conditions of fellow employees. With regard to the work rank-and-file employees do for the employing entity, the employer is liable for their actions. In this case, for example, Ms. Faragher and the other lifeguards did not determine the working conditions on the waterfront, but were responsible for swimmer safety. The City of Boca Raton was therefore answerable for the lifeguards' actions in carrying out their water safety duties, but not, without more (such as knowledge by those who were responsible for working conditions of pervasive discriminatory harassment by co-employees) for the conduct of the lifeguards vis-a-vis each other.

Consequently where—as is true in this case with regard to Mr. Terry, the on-site manager of the employing entity's marine safety operation and, it appears, was true in *Meritor* with regard to the bank branch manager—the employer proceeds by assigning an on-site supervisor, with broad authority over the manner in which work is performed and with a general discretion as to how directions regarding that work are to be conveyed, that individual *is* the representative of the employer for those purposes. And, where the asserted Title VII wrong is the "creat[ion of] a work environment abusive to employees, because of their race, gender, religion or national origin [that] offends Title VII's broad rule of workplace equality" (*Harris*, 114 S. Ct. at 371), actions taken by a supervisory employer representative, with general responsibility to set or to impliment day-to-day work rules and working conditions, *are* actions taken by an individual with authority over the *particular* managerial area that gives rise to the violation.

The governing legal standard, and the proper legal analysis, is the same as the one that leads to the all-but-universal rule that it is the employer that is responsible for a style of supervision by a department supervisor that meets tort standards for intentional infliction of emotional distress, and for a style of supervision that segregates the workplace on the basis of race, despite clear official employer policy to the contrary. Under that standard, creation of a sexually discriminatory abusive work environment by supervisors "charged with the day-to-day supervision of the work environment . . . should [not] have different consequences than abuse of [authority over economic terms of employment]." *Meritor*, 477 U.S. at 76 (Marshall, J., concurring).[5]

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[5] Indeed, for reasons of workplace discipline and productivity, the employing entity ordinarily encourages employees working under a site manager or department head to regard that on-site person as the primary employer representative even if economic decisions are made elsewhere. For it is to the employer's benefit to structure the

4. The common law of agency "scope of employment" concept, then, provides general "guidance" indicating that the kinds of distinctions some of the courts of appeals have drawn to distinguish cases concerning supervisory hostile environment sexual harassment from other kinds of discrimination unlawful under Title VII cannot stand analytical scrutiny. At the same time, the background "scope of employment" law ceases to be particularly instructive with regard to one other aspect of the issue before the Court—whether, as the Court of Appeals in this case maintained, an employer is absolved from responsibility for supervisor actions otherwise within the supervisor's scope of employment where the supervisor "has no intention to perform any service for his employer, but instead seeks only to further some personal end." Pet. App. 10a; *see* Restatement § 228 ("[C]onduct of a servant is within the scope of employment . . . only if . . . it is actuated, at least in part, by a purpose to serve the master").

It is far from clear whether the drafters of the Restatement would view acts of a supervisor—invested with authority to establish and oversee working conditions—which create a discriminatorily abusive working environment as acts that fall outside the scope of employment because actuated by a purely personal motive. Quite possibly, the close connection between the authority entrusted to such a supervisory employee and the pervasive imposition of abusive treatment on employees *while carrying out that supervisory responsibility* would bring the abusive speech or action within the "dual purpose" rule—that "[c]onduct may be within the scope of employment, although done in part to serve the purposes of the servant . . ." Restatement § 236; *see* illustration (2) (where "A servant of P., to accommodate a friend who is riding with him, drives a master's truck at an excessive rate of speed[;] . . .

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workplace so that the employees will obey the directives of their supervisor as those of the employer, and will accept the decisions of the supervisor as those of the employer.

[s]uch driving is within the scope of employment"); Restatement § 235 (indicating that acts are within the scope of employment if "perform[ed] . . . as a part of or incident to a service on account of which [the employee] is employed").

Given the dual purpose rule, sexual harassment such as that in this case is properly and fairly characterized as the supervisors' manner of carrying out acts within their authority, albeit a manner chosen out of, and to meet, the supervisor's sense of personal satisfaction. See Pet. App. 27a-29a (Barkett, J., dissenting), and cases cited (because the supervisors in this case "were charged with creating and maintaining a productive, safe work environment, while directing their employees in the performance of their duties" and "[i]t is while they were engaged in their responsibilities that the harassment of Faragher occurred," common law of agency scope of employment concepts support holding the employer liable); *Jansen, supra,* 123 F.3d at 574 (Wood, J., dissenting) (in determining "whether the supervisor, is acting at least in part for the purpose of serving the employer," the "conduct of the supervisor that must be assessed is not the act of harassment in isolation, but instead his broader course of action"; sexually harassing acts are therefore within the scope of employment as long as "the supervisor . . . committed the acts of harassment as he exercised the authority . . . the employer conferred on him").

Having said that, it is also proper and fair to add that the common law of agency is in flux on the closely analogous question of employer tort liability for acts taken by employees to satisfy personal predilections or urges while otherwise performing authorized services for the employer, and that the common law outcomes in cases raising variants on that question vary from jurisdiction to jurisdiction and situation to situation. Thus, for example, while in the past smoking while working was regarded as outside the scope of employment, "more recently . . . smoking on the job has quite generally been held to be within the scope of

employment," so that employers are now often held liable for injuries caused by employees smoking while working. Prosser & Keeton, *supra*, at 504. Similarly, while the older cases held that "where the servant, for strictly personal reasons and not in furtherance of his employment, loses his temper and attacks the plaintiff in a quarrel which arises out of the employment," the assault is outside the scope of employment because not in furtherance of the employer's interest, the more recent cases "allow recovery on the ground that the employment has provided a peculiar opportunity and even incentive for such loss of temper." *Id.* at 507.[6]

More importantly, even if the common law on these somewhat analogous issues were clearer than it is, the *particular federal statutory question here*—which, stated generically, is whether employers are to be held responsible under Title VII for discriminatory actions taken by supervisory employees where the discrimination furthers the supervisors own interests only and not those of the employer—is one as to which "common law principles may not be transferable in all their particulars to Title VII." *Meritor*, 477 U.S. at 77.

It is beyond doubt that many supervisors who discriminate on the basis of sex, race, religion or national origin have no thought that by so doing, they are serving their employer. Rather, the prejudices underlying their behavior are often their own, and reflect personal animus or preference. Yet, nothing in the language or history of Title VII, so far as we are aware, suggests that the statute is directed only at economically useful discrimination, and not at discrimination that is the result of purely personal prejudice, whether that prejudice be that

[6] It is our understanding that the American Law Institute is currently in the process of drafting a Restatement Third of Agency, presumably because there has been sufficient development in the law of agency as a whole since the last revision to merit that major undertaking.

of the abstraction we call the employer or of some individual endowed by the employing entity with authority to govern the workplace in some regard.

This point is made clearer, as it applies to the sexual harassment situation particularly, by returning to the comparison between the situations in *Harris* and in *Meritor* with which we began. There is no doubt, we are sure, that in *Harris*, Forklift would be responsible for the discriminatorily abusive working conditions created by Mr. Harris' actions as president of the company whether his disdain for women was purely personal or reflected his considered conclusion that women deserve a second-class status in the workplace because they are less productive employees than men. And, we can conceive of no reason within the purpose of Title VII for applying a different rule regarding the application of Title VII to personally-motivated discrimination if Mr. Harris, as the manager of a branch of Forklift in a separate location, rather than as the company president, took exactly the same actions with exactly the same impact on women workers.[7]

[7] The dissents in the Court of Appeals in this case make a separate foray into the common law of agency, invoking the common law principle that an employing entity is liable for the acts of its agents if the agent was aided in causing the injury by the fact of the agency, to reach the result that the employer is responsible for the supervisor employee hostile workplace sexual harassment alleged here. Restatement § 219(2)(d); Pet. App. 29a (Barkett, J., dissenting); Pet. App. 40a (Anderson, J., dissenting). But, once again, the common law rules in this regard are somewhat unclear, and open to conflicting interpretations. *Compare Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1445 (10th Cir. 1997) with *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir.), *cert. denied*, —— U.S. ——, 116 S. Ct. 569 (1995). We therefere suggest that the analysis in text, melding those common law of agency concepts that *are* clear and indisputable with Title VII substantive priciples states a more useful approach.

If, however, the Court does analyze the issue here, as did the Court of Appeals in this case, on a Restatement § 219(d)(d) theory, then the Court should reject the untenable distinction drawn by the Court of Appeals between explicit and implicit reliance on the su-

In short, just as "Victorian common law does not define the limits of the antitrust private action," even though "[w]e look to the general principles of the common law for guidance in deciding the scope of the antitrust cause of action," (*American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 568-69 n.6 (1982)), so Victorian common law cannot answer the basic Title VII question whether liability lies where management representatives' discriminatory behavior is motivated by personal reasons rather than economic reasons. And, as the foregoing shows, the congressional intent that led to the

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pervisor's ability to affect the discriminatee's economic status or job security. Pet. App. 13a (the harassing supervisors were not "aided in accomplishing the harassment by the existence of their agency relationship with the City" because "no person threatened to fire or demote Faragher for refusing the accomodate [the supervisor's] harassing overtures.")

As the National Labor Relations Board and the courts have recognized in applying the National Labor Relations Act, management representatives' conduct toward, and statements to, employees that would be taken as innocent outside the employment relationship take on a coercive cast by reason of that relationship. That is because the supervisor and the employees are necessarily aware of the supervisor's authority to disadvantage the employee, even if that authority is not expressly invoked.

For example, because "[employees] know the consequences of incurring the employer's strong displeausre," (*International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 78 (1940), verbal presentations that "to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart" (*NLRB v. The Federbush Co.*, 121 F.2d 954, 957 (2nd Cir. 1941) (L. Hand, J.)). *See also NLRB v. Kaiser Agricultural Chemicals, Div. Of Kaiser A. & C. Corp.*, 473 F.2d 374, 381 (5th Cir. 1973) ("The question is not only what the employer intended to imply but what the employees could reasonably have inferred); *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 617-18 (1969) (in determining whether a violation of employees' rights has occurred, courts "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.").

enactment of Title VII, dictates that no line between personally and economically motivated discriminatory actions can be drawn under the statute, whether for the purpose of determining liability for the actions of supervisors charged with governance of the working environment or for any other purpose.[8]

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[8] Under the analysis presented in text, the existence of an employer policy forbidding sexual harassment by supervisors and providing for a means of complaining about any such harassment to higher management would no more absolve the employing entity of all responsibility for the creation of a discriminatorily abusive work environment than a similar policy would avoid liability for a discriminatory discharge or other violation of Title VII by a mid-level supervisor. At the same time, such a policy—if, unlike the policy in this case—communicated effectively and with emphasis, providing for protection from retaliation, and producing effective, prompt responses, can protect employing entities from liability for hostile environment sexual harassment by supervisors in four ways:

First, since such harassment violates Title VII only if sufficiently pervasive as to alter the employee's working conditions, an effective policy can encourage employees to report harassment before it reaches the actionable level.

Second, as the concurrence in *Meritor* noted, the existence of an effective policy would be relevant to a constructive discharge claim: "Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court might be reluctant to find constructive termination," where the employee quit rather than try to remedy the discrimination internally. 477 U.S. at 78 (Marshall, J, concurring).

Third, the existence of an effective policy for reporting and remedying sexual harassment might be relevant to compensatory damages, on a theory akin to the mitigation requirement. In that instance, however, once liability was established, the burden would presumably be on the employer to show that the compensatory damages suffered were higher than they would have been had the employee used an available reporting system, and that there were no explicit or implicit deterrents to using the system.

Finally, the existence of an effective internal sexual harassment policy would certainly be relevant in assessing punitive damages.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1997

BETH ANN FARAGHER,

Petitioner,

v.

THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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IN THE
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THE CITY OF BOCA RATON,
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Respondent.

MOTION FOR LEAVE TO FILE A BRIEF
AS *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law and the American Civil Liberties Union move for leave to file a brief as *amici curiae*. The issues to be decided herein affect the interests of both organizations, as set forth in the accompanying brief.

We have filed letters of consent from both the petitioner and the respondent, but we have not been able to obtain letters of consent from William Terry and David Silverman, who were defendants before the district court but did not appeal and did not participate in the appellate proceedings below. Counsel for Mr. Terry has informed us that Mr. Terry will not participate before this Court, and former counsel for Mr. Silverman states that he no longer represents Mr. Silverman. We have provided both of these attorneys, as well as attorneys for the active parties, with copies of the accompanying brief in advance of the 3:00 P.M. deadline today.

Richard T. Seymour

RICHARD T. SEYMOUR

Dated: December 29, 1997

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STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law and the American Civil Liberties Union Foundation submit this brief as *amici curiae* in support of the petitioner.[2]

The Lawyers' Committee for Civil Rights Under Law was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, numerous law school deans, and many of the nation's leading lawyers. It has local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, including a large number of cases challenging discrimination in employment based on race or sex. The Lawyers' Committee is a tax-exempt, nonprofit civil rights organization. The Lawyers' Committee has handled

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[1] No counsel for any party had any role in authoring this brief, and no person or entity other than the named *amici curiae* or their counsel have made any monetary contribution to the preparation or submission of this brief.

[2] Pursuant to Rule 37.3(a), *amici* are filing herewith written consents of the remaining active parties to the submission of this brief. Mr. Terry and Mr. Silverman are not participating before this Court. Mr. Terry's counsel has nonetheless promised a letter of consent, but it has not been received. Mr. Silverman's former counsel no longer represents him. In an abundance of caution, *amici* are also filing a motion for leave to submit this brief.

cases involving both racial and sexual harassment.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights and this nation's civil rights laws. The ACLU actively supported the enactment of the 1964 Civil Rights Act and, since its passage, has appeared before this Court in numerous cases involving the meaning and scope of Title VII. Because the ACLU believes that an appropriate test for employer liability is critical to the effective enforcement of Title VII—for women as well as for racial minorities—the ACLU has a substantial interest in the proper resolution of this case.

The decision in this case will decide the standards that will govern claims of racial, sexual, religious, and national origin harassment. Such harassment strongly discourages women and minorities from taking nontraditional jobs, and thus strikes at two of the core purposes of Title VII. Affirmance of the Eleventh Circuit would as a practical matter make Title VII's promise of a harassment-free workplace extremely difficult to enforce, defeating the purpose of Congress in enacting the statute in 1964, and in expanding its remedies in 1991.

STATEMENT OF THE CASE

The district court made the following findings after a bench trial of all claims: Petitioner worked as an ocean lifeguard in the Marine Safety Section of the Parks and Recreation Department for the respondent City, on an intermittent basis from September 1985 through June 1990. Findings 1–2, Pet. App. at 70a. Her supervisors during that time included Bill

Terry, then the Chief of the Marine Safety Section, David Silverman, a Lieutenant and later a Captain in that Section, and Robert Gordon, then a Captain in that Section. Finding 5, Pet. App. at 71a.

Lifeguards reported to lieutenants "and above them to Marine Safety captains," the captains reported to Marine Safety Chief Terry, he reported to the Recreation Superintendent, the Recreation Superintendent reported to the Director of Parks and Recreation, and the Director reported to the City Manager. However, according to the trial court, "neither Terry, nor Silverman, nor Gordon had the standing necessary to qualify as higher management for the City." Findings 5 and 7, Pet. App. 71a. Neither of the lower courts made any finding identifying the person or position who would have "the standing necessary to qualify as higher management for the City," and neither adopted any rule to guide harassment victims with claims against the City or against other employers within the Eleventh Circuit.

All of the lifeguards were male until 1977, when the City hired its first female lifeguard. At the time of the incidents in question, most of the lifeguards were male, with only four to six female lifeguards out of a total force of forty to fifty. The headquarters building was small, with just one locker room, restroom, and inside shower. All of the lifeguards were required to share the same locker room and shower, leading sometimes to a "somewhat boisterous" camaraderie although the district court credited the testimony of petitioner's co-plaintiff, Ewanchew (after her marriage, Oakland), that "the atmosphere in the locker room was respectful among members of a particular shift." Findings 9–11, Pet. App. 72a.

The trial court found that all of the following touching of female employees by Section Chief Terry was uninvited: "Terry had a propensity to touch female employees on various parts of their anatomies, including the waist, neck, and buttocks." ". . . Terry pressed himself against Ewanchew's buttocks and moved his hips simulating sexual movement." ". . . Terry touched Ewanchew on one breast and on the buttocks." ". . . Terry would put his arm around Faragher and let his hand rest upon her buttock." The court found petitioner Faragher's testimony to be credible "regarding Terry's uninvited touching of her buttocks." The court found "most credible" Beverly Barta's testimony that "Terry touched her on the buttocks without her consent," and that she found it offensive and avoided him afterwards. The court found Jamie Herrington's testimony credible "that Terry placed his hand on her thigh," and found Gayle Nye's testimony credible "that she was the subject of several instances of offensive touching by Terry, such as putting his arm around her hip." Findings 15–19, 21–22, and 24, Pet. App. 73a–75a. The lower court found that Lieutenant Silverman tackled petitioner, and also found that he told her: "'If you had tits I would do you in a minute.'" Finding 27, Pet. App. 76a. The lower court found petitioner's description of the incident credible, and stated that it "disbelieves" Lieutenant Silverman's denial. *Id.* The lower court also found that Lieutenant Silverman engaged in "a pantomime depicting cunnilingus by flicking his tongue, in the presence of both Faragher and Ewanchew, despite Silverman's denial of his having engaged in such conduct." Finding 28, Pet. App. 76a. The court of appeals did not disturb any of these findings.

The lower court did not find that any of this physical conduct could reasonably have been seen by Section Chief Terry or Lieutenant Silverman as innocent, or as anything other than offensive.

The lower court found that Section Chief Terry remarked to Ewanchew that petitioner "was male-like because she had no breasts," and that Terry "referred to women as 'cunts' and 'bitches.'" Findings 20 and 22, Pet. App. 74a–75a. The lower court also found that Section Chief Terry, in the course of conducting the first employment interview with Victoria Bonner for a lifeguard position, "asked her if she was going to 'fuck' or 'screw' all of the male lifeguards like the rest of the female lifeguards," and that as a result Bonner avoided him thereafter. Finding 23, Pet. App. 75a. The lower court found that Lieutenant Silverman made "inappropriate, but not sexually oriented"[3] remarks to Ewanchew "such as, 'There are a lot of tits on the beach today.'" Finding 29, Pet. App. 76a. The lower court also found credible "Gayle Nye's deposition testimony regarding Silverman's use of offensive language when addressing her. On her first day on the job, Silverman said to her, 'I want to lick your clit.'" Finding 36, Pet. App. 79a. The court credited "Jamie Herrington's testimony that Silverman referred to her nipples being apparent under the cloth of her bathing suit because it was cold, and Silverman's remark that he would like to 'eat between her legs.'" Finding 34, Pet. App. 77a–78a. The trial court "found Beverly Barta to be a most credible witness" as to the offensive conduct she experienced from both Terry and Silverman. Findings 21 and 37, Pet. App. 74a, 79a. Barta testified that she heard Lieutenant Silverman ask lifeguard Betty Lynn for a blow job. June 23, 1994 Tr. 6 lines 5–8. The court of appeals did not disturb any of these findings.

The lower court did not find that any of this verbal

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[3] Such remarks have an obvious sexual orientation, but the district court may simply have meant that they were not made as part of a sexual proposition by Lieutenant Silverman.

conduct could reasonably have been seen by Section Chief Terry or Lieutenant Silverman as innocent, or as anything other than offensive.

The court distinguished Ewanchew's testimony about the conduct of Section Chief Terry and Lieutenant Silverman from some of her other testimony, "finding credible her allegations of the conduct by both Terry and Silverman." Finding 31, Pet. App. 77a. The trial court's summary descriptions of Ewanchew's allegations, and its undisturbed finding that all of her testimony about Lieutenant Silverman's conduct was credible, justify this Court's reliance on Ewanchew's full descriptions of Lieutenant Silverman's conduct,[4] and how it came to pass.

By virtue of his rank and in the absence of an emergency, Lieutenant Silverman was entitled to sit with any

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[4] Ewanchew testified, for example, that Lieutenant Silverman repeatedly referred to the percentage chances of rain as the percentage chance that he would "get a blow job today." June 21, 1994, Tr. 55, lines 14–17. Petitioner testified to the same effect, June 22, 1994, Tr. 140 line 24 to Tr. 141 line 2, and stated that on rainy days Lieutenant Silverman "many times" proposed lewdly that she join him in the back of his camper truck, while raising his eyebrows and acting excited. *Id.*, Tr. 141 line 3 to Tr. 142 line 8. Ewanchew testified that Lieutenant Silverman repeatedly banged on the door when women were in the inside shower and stated that he wanted to join the woman in the shower, in effect requiring the women to go en masse into the restroom to provide some certainty that he would not come in while one of them was in the shower. June 21, 1994, Tr. 56 line 20 to Tr. 57 line 5. Peititioner described the same conduct as occurring "many times." June 22, 1994, Tr. 138 line 10 to Tr. 139 line 19. Petitioner also described Lieutenant Silverman's custom of referring to the number of female lifeguards assigned to his section of the beach by doubling the number and stating that he had that many tits on his beach that day. *Id.*, Tr. 145 line line 25 to Tr. 146 line 12.

lifeguard he was supervising, in his or her tower, for as long as Lieutenant Silverman chose.[5] Ewanchew testified as to his conversation when she was an unwilling captive audience:

> And he mentioned, when I sat—well, when he was my lieutenant and I had to sit with him all day, he talked about his sexual conquests with a beach patron that was drunk, and how he had sex with her in the back of his truck. And another lifeguard watched through the window. And I had to sit there and listen to all day his descriptions of what he did with this drunk.
>
> And he often tried to get me in conversations, sexual type conversations. And one time he brought up that term helmet and I didn't know what it was, I didn't know what he was talking about. And I said, What's that? And then he went into a big description about, oh, it's the head of my, of my penis, I and do you want to see him, and do you want to see my helmet.
>
> And he bugged me about that for a long time

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[5] Testimony of Jamie Sue Harrington, June 21, 1994, Tr. 137, lines 18–19 ("sometimes lifeguards and lieutenants would sit in the same lifeguard towers together.") and Tr. 138 lines 1–2 ("Well, during my eight-hour shift I would sit with him for about six hours . . ."); testimony of petitioner, June 22, 1994, Tr. 144 line 11 to Tr. 145 line 9 (she was sometimes assigned to work at one of the busier towers with a Lieutenant, and sometimes the Lieutenant joined her when he came on rounds); testimony of Nancy Ewanchew, June 21, 1994, Tr. 57 lines 17–23 (sometimes she was scheduled to be the second guard at a tower: "And I'd have to sit there all day with him." Other times, he would be making rounds "and sometimes he would sit with you for a certain amount of time and say, you know, what he would call visit with the peach on his beach.").

after and he referred to the women that I worked with that I really liked and I had a good rapport with in real derogatory terms, using words, you know—he said about Betty Leen, he made fun of her breasts and how, made fun of her and said that she hung out of her bathing suits and that she looked funny when she ran, that she bounced all over. And made fun of her.

And he made fun of Beth Faragher and said that she had a flat chest, and made fun of her about that. And said she had a tight ass. And I had to sit there and listen to him when he would come to my tower. And a girl would be sitting on the beach and he would describe beach patrons and say about their body. And he said a lot of things that were very inappropriate on almost a daily basis when I worked with him.

June 21, 1994, Tr. 55 line 18 to Tr. 56 line 19.

Beverly Barta, whom the district court described as "a most credible witness," Finding 37, Pet. App. 79a, testified that Lieutenant Silverman used his rank to further the sexually-oriented atmosphere: "I would say as a leader, I would say he kind of set the tone or the mood for the climate there." June 23, 1994, Tr. 10, lines 10–11.

The trial court found that "Terry's and Silverman's sexual harassment conduct toward females in the Marine Safety Section was both severe and pervasive." Finding 44, Pet. App. 81a. The court also found that "the majority of the female lifeguards" complained to Lieutenant (later Training Captain) Robert "Flash" Gordon. Finding 48, Pet. App. 82a. Gordon testified that "practically all" of the female lifeguards com-

plained to him about sexual language and actions. June 21, 1994, Tr. 153, lines 3–7. He admitted that Gail Nye had complained to him that Lieutenant Silverman "had invited her at lunch time to go back to his truck so that he could lick her clit." *Id.*, Tr. 153 line 19, Tr. 154 line 25 to Tr. 155 line 1. Lieutenant Gordon admitted that petitioner had complained to him "that she had been tackled during the morning workout by Mr. Silverman," *id.*, Tr. 158, lines 16–18, and that "one morning she came up crying and she said that Captain Silverman had thrown her down in the sand and told her that if she had tits he would do her in a minute." *Id.*, Tr. 159, lines 13–15. Lieutenant Gordon admitted that Nancy Ewanchew had complained "several times" about being touched, *id.*, lines 19–24, she complained about language, *id.*, Tr. 160, line 3, and he thought that "she was both verbally and physically harassed."[6] *Id.*, lines 5–7. Lieutenant Gordon admitted that

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[6] The district court's dismissal of Nancy Ewanchew's Title VII claim was based on its finding that Ewanchew did not find Section Chief Terry's or Lieutenant Silverman's conduct intolerable at the time she was employed, but only later. Finding 31, Pet. App. 76a–77a. This finding is supported in the record only by the testimony of Captain Silverman, as to which the trial court stated: "The Court found none of this testimony to be credible," Finding 33, Pet. App. 77a, and by its finding that Ewanchew applied for part-time employment after her resignation, Pet. App. 101a. The district court made no effort to reconcile its finding that Ewanchew did not find the conduct intolerable at the time she was employed with its finding that Ewanchew complained of this conduct to Lieutenant or Captain Gordon, Finding 48, Pet. App. 82a, with Gordon's undisputed testimony that Ewanchew complained about Terry's and Silverman's conduct "probably more than any of the other women on the patrol," June 21, 1994, Tr. 159 lines 19–20, and with its finding that Gordon limited his testimony so as not to "take sides." Finding 49, Pet. App. 82a. The panel opinion in the Eleventh Circuit affirmed, holding that there was no inconsistency between the award of damages on Ewanchew's battery claim,

Ms. Leen complained to him about jokes or wisecracks about the size of her breasts and about Lieutenant or Captain Silverman calling them tits. *Id.*, Tr. 161, lines 2–11.

Lieutenant Gordon testified that the City never told him what he should do if a female employee complained that a man was talking dirty to her or groping her. *Id.*, Tr. 157 lines 3–14. The City did instruct him how to prepare disciplinary action record cards, *id.*, lines 15–20, but he never prepared any such cards in response to the women's complaints because "I didn't think it was my place to record card or discipline a supervisor." *Id.*, Tr. 157 line 24 to Tr. 158 line 12. Moreover, Lieutenant Gordon actively discouraged the women from complaining further:

> Q. What, if anything, did you tell women lifeguards who complained to you, as we've just listed them, about whether or not they should go higher than Mr. Terry and take these complaints to City Hall?

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which could flow from a delayed reaction, and the finding that she did not then perceive her work environment to be hostile. Pet. App. 49a–51a. The panel also upheld the district court's reliance on Ewanchew's post-employment application for a part-time job as showing that she could not have then perceived her work environment to be hostile. Pet. App. 50a. The *en banc* court affirmed the district court on this question without discussion. Pet. App. 5a n.3. Like the district court, the Eleventh Circuit failed to see the irreconcilable conflict in the district court's findings and in the undisputed record, and assumed that a woman must give up her right to work in order to protect a hostile-environment claim. While the clear error in the lower courts' treatment of Ewanchew's then perceptions cannot now be cured, that error should not deter this Court from relying on Ewanchew's testimony as to the notice provided to the City.

> A. Well, I pretty much left that decision to them. But advised them that in the past there have been times when going to City Hall wasn't as productive as we had hoped it would be.

Id., Tr. 161 lines 12–18. He told them they "need to be careful." *Id.*, Tr. 161 line 19 to Tr. 162 line 22. Nancy Ewanchew testified that the reason she complained to Lieutenant or Captain Gordon was because "he was a superior of mine," and she "wanted him to see if he could do something about it or try to stop it or tell them to stop it. And I asked him what I should do." *Id.*, Tr. 65, lines 17–24. She testified that he told her "that the City didn't care and that just to basically just to stick it out." *Id.*, Tr. 66, lines 6–7. She complained again to him about the same types of problems, and stated: "And I couldn't understand why he couldn't do something, being a supervisor." *Id.*, lines 11–13. She complained a third time, and described the response, *id.*, lines 18–21:

> A. It's the same. The same thing. I wanted him to do something about it and he said that I can't do anything, I'm powerless, that the City doesn't care and that there is nothing that can be done, and just to stick it out.

Petitioner was a part-time employee without civil service protection. She understood that Terry was responsible for her evaluations and her raises, and could fire her at will.[7] June 22,

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[7] Richard Bender, the City's Personnel Director, wrote in his report of his investigation into the allegations of sexual harassment that the department is able to relieve itself of unsatisfactory unclassified employees with great facility, and testified that an "unclassified employee serves at the will of the City Manager" and has no civil service job protections. June 24,

1994, Tr. 127 lines 4–20. She testified that she did not complain to someone at City Hall "because I feared retaliation if I did it. I felt like if I did complain, there was probably a good possibility that I would lose my job." *Id.*, Tr. 152 lines 10–14 and 22–25. She testified along the same lines as Captain Gordon, *id.*, Tr. 153, lines 1–7:

> I had heard things. Basically, heard about people being retaliated against that had gone down to complain to City Hall, or—and I also had heard that, you know, even if people did go down to City Hall, basically nothing would happen because of it. It seemed like Bill Terry had absolute, like, control over the beach patrol and what happened there.

The district court held that Captain Gordon's knowledge could not be imputed to the City because he was not part of "higher management," Finding 54, Pet. App. 84a, and because the female lifeguards assertedly talked to him "not on a subordinate to superior basis, but because of the high repute in which he was held . . . ." Finding 48, Pet. App. 82a. The *en banc* court of appeals agreed with that assessment (although reversing the district court on another ground): "Gordon did not receive that information as the City's agent; he received it as a friend held in high repute by his colleagues." Pet. App. 15a n.9.

Personnel Director Bender testified without dispute in the deposition excerpts admitted at trial that supervisors have an affirmative duty to report to management improper activity that could be construed as sexual harassment. June 23, 1994, Tr. 55 lines 11–19 and Tr. 57 line 22 to Tr. 58 line 2. He

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1994, Tr. 24 line 23 to Tr. 25 line 9.

agreed that it is a Captain's job to report incidents of inappropriate behavior to higher-ups. June 24, 1994, Tr. 34 lines 3–5. Bender's undisputed trial testimony was that there was no mention of sexual harassment in the employee handbook, which he had revised several times, and that the City relied instead on a "generalized statement to invite employees to bring forward any problems they had in the workplace to" an undefined "us." *Id.*, Tr. 32, lines 1–14. Bender's undisputed testimony in his deposition excerpts was that employees with problems are urged "to work through the chain of command," that the City did nothing specifically to inform employees how to raise the issue of sexual harassment, and that employees have "the opportunity to talk to supervisors through an informal process." June 23, 1994, Tr. 52 lines 6–8 and Tr. 53 lines 11–14. He did not describe any alternative for employees whose problem was caused by their supervisors.

The district court found that the City had prepared a written sexual harassment policy on February 29, 1986, but also found "a complete failure on the part of the City to disseminate said policy among Marine Safety Section employees. Neither Terry nor Silverman were ever told or made aware of the City's sexual harassment policy prior to" the City's investigation of Ewanchew's letter describing the harassment. The trial court also found that Ewanchew herself never got a copy of the policy while she was employed by the City. Findings 51–52, Pet. App. 83a. Petitioner testified without dispute that she does not recall hearing or seeing anything about the City's sexual harassment policy until May or June 1990, after Ewanchew's complaint to Bender. June 22, 1994, Tr. 153 lines 10–25.

The trial court found that Ewanchew wrote a letter to Richard Bender on April 23, 1990, complaining of sexual

harassment. Finding 41, Pet. App. 80a. This was a year after she had left her job. Findings 2 and 50, Pet. App. 70a and 83a. This was the first such complaint to Parks and Recreation Department management officials higher than the Marine Safety Section. Finding 45, Pet. App. 44. As a result of Bender's investigation, Section Chief Terry forfeited 160 hours of annual leave, and Captain Silverman forfeited 40 hours of annual leave. Finding 42, Pet. App. 80a. The trial court found that "Bender exhibited a somewhat cavalier attitude toward the severity of Terry and Silverman's conduct, and its potential effect upon the City." Finding 44, Pet. App. 81a.

At trial, the district court (a) found the City liable to petitioner for a hostile working environment under Title VII based on constructive notice flowing from the pervasiveness of Section Chief Terry's and Lieutenant or Captain Silverman's conduct, and awarded petitioner one dollar in nominal damages on that claim; (b) found that Silverman and Terry were jointly and severally liable to petitioner on her 42 U.S.C. § 1983 claim and that Terry was liable to petitioner on her battery claim, and awarded petitioner $10,000 in compensatory damages jointly and severally against Terry and Silverman and $500 in punitive damages against Terry; (c) found that the City was not liable to Ewanchew on her Title VII and § 1983 hostile-environment claims; and (d) found that Terry was liable to Ewanchew on her battery claim and awarded her $35,000 in compensatory damages and $2,000 in punitive damages against Terry. Pet. App. 103a–104a. The panel of the Eleventh Circuit reversed the trial court's findings that the City had constructive notice of the harassment and that the City had violated petitioner's rights under Title VII, but affirmed on all other issues. Pet. App. 66a–68a. The divided *en banc* court agreed. Pet. App. 18a.

The question before this Court is therefore not whether there was a hostile working environment, but whether the City can be held liable under Title VII for the unlawful behavior of its officials.

SUMMARY OF ARGUMENT

While agency principles can provide useful guidance in deciding racial and sexual harassment cases, their application should be guided and limited by the purposes of Title VII.

Here, both agency principles and Title VII independently require that Lieutenant (later Captain) Gordon's knowledge be imputed to the City. He was under a duty to report all matters of significance to higher levels of management, and only the City was in a position to train him in that duty and to enforce it. The petitioner, who was powerless to enforce that duty, should not be visited with the consequences of the City's and Gordon's failures.

The lower court's rule effectively requires harassment victims to use internal complaint procedures where available or, like here, to make one up and follow it. Congress has expressly rejected such a requirement, and the lower court was not free to ignore its action.

Terry and Silverman were each under a duty imposed by the employer to report their own knowledge, and under agency law they are not excused from such a duty by their personal need to cover up their misdeeds. Moreover, their knowledge should be imputed to the City precisely because it involved words or deeds that a reasonable supervisor would know constitutes harassment.

The City is also liable for Terry's and Silverman's actions because they were aided by the agency relationship in accomplishing their harassment.

Finally, the fact that the Marine Safety Section was a few miles "remote" from City Hall cannot be considered a barrier to constructive notice.

ARGUMENT

I. The Courts' Reliance on Agency Principles Should Not Be Allowed to Defeat the Purposes of Title VII

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986), the Court held that employers are not automatically liable for sexual harassment by their supervisors, that "absence of notice to an employer does not necessarily insulate that employer from liability," and that "Congress wanted courts to look to agency principles for guidance in this area." At the same time, the Court cautioned that "such common-law principles may not be transferable in all their particulars to Title VII."

Sec. 701(b) of Title VII, 42 U.S.C. § 2000e-(b), defines the term "employer" as including any "agent" of an employer, and *Meritor* stated that this definition "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are responsible." 477 U.S. at 72. At the time, it was still an open question whether Title VII permitted direct suits against harassing supervisors. However, all Circuits addressing this issue in the past decade have held that Title VII does not allow claims against supervisors in their

personal capacities.[8] Because § 1983 is not available against supervisors in the private sector, Title VII claims against employers are often the only means of redress under Federal law for victims of racial or sexual harassment.

The hopes of Congress and this Court that agency law would provide a relatively clear set of principles that would enable the lower courts to develop just and uniform rules of decision have not borne their intended fruit. Different Circuits have developed sharply different views of agency law, and some have misplaced the role of agency law as a guide to the application of Title VII by effectively submerging the purposes of the statute beneath the arcana of agency law as understood in that Circuit. This case presents an opportunity for this Court to restore the primacy of the statute and its purposes, making clear both the manner in which agency law should properly be used in applying the statute and the point at which the courts should

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[8] *E.g.*, *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995); *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1241 n.2 (2d Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313–17 (2d Cir. 1995); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1077–78 (3d Cir. 1996) (*en banc*), *cert. denied*, 117 S. Ct. 2532 (1997); *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 n.2 (5th Cir. 1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir.), *cert. denied*, 513 U.S. 1015 (1994); *Geier v. Medtronic, Inc.*, 99 F.3d 238, 244 (7th Cir. 1996); *Williams v. Banning*, 72 F.3d 552, 553–54 (7th Cir. 1995) (recognizing that plaintiff had no remedy for sexual harassment, because the employer took prompt and effective corrective action when plaintiff stopped insisting that her complaint be treated as confidential); *Ortez v. Washington County*, 88 F.3d 804, 808 (9th Cir. 1996); *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 110 (1996); *Haynes v. Williams*, 88 F.3d 898, 901 (10th Cir. 1996) (availability of damage claims under the 1991 Act does not change the rule); *Cross v. Alabama Department of Mental Health & Mental Retardation*, 49 F.3d 1490, 1504 (11th Cir. 1994).

look to the purposes of Title VII rather than agency law for their principal guidance.

II. The Lower Court Misapplied Agency Law, and Ignored the Purposes of Title VII, in Failing to Impute Gordon's Knowledge to the City

Based on their experience in representing clients in numerous cases, *amici* have found that the fear of retaliation is both so frequent and so intense that a discriminatory situation may fester long before a victim summons enough courage to complain. The fear of retaliation is particularly strong in cases involving intentional racial or sexual discrimination, because the intensity of the wrongdoer's reaction is in our experience related to the degree to which the conduct is shameful.

The courts and Congress have long recognized the substantial danger of workplace retaliation for reporting a noncriminal violation of law. In Fair Labor Standards Act cases prosecuted by the government, the courts have recognized an "informant's privilege" to protect employees from retaliation, itself unlawful but difficult to prove, where such protection does not interfere with the employer's ability to mount an effective defense, or the government's needs in prosecuting the case.[9]

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[9] *E.g.*, *Brock v. On Shore Quality Control Specialists, Inc.*, 811 F.2d 282 (5th Cir. 1987); *Wirtz v. B.A.C. Steel Products, Inc.*, 312 F.2d 14, 16 (4th Cir. 1962) ("The average employee involved in this type of action is keenly aware of his dependence upon his employer's good will, not only to hold his job but also for the necessary job references essential to employment elsewhere."); *Mitchell v. Roma*, 265 F.2d 633, 637 (3d Cir. 1959) ("The statutory prohibition against retaliation provides little comfort to an employee faced with the possibility of subtle pressures by an employer, which pressures may be so difficult to prove when seeking to enforce the prohibition.").

Congress has enacted a specific prohibition of retaliation in § 704 of Title VII, and this Court held just last Term that even former employees are protected by this prohibition. *Robinson v. Shell Oil Co.*, __ U.S. __, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

The well-placed fear of retaliation must be taken into account before imposing jump-through-the-hoops complaint requirements on harassment victims. Our practical experience reveals that victims of racial and sexual harassment are often persons with relatively little "clout" in an organization. The selection of the official to whom to complain is often an agonizing decision, and the most natural recipient of such a complaint will be an official the complainant knows, *i.e.*, one close to her or his own level. Particularly where the employer has not advised employees of anyone different to whom they should complain, it is simply unrealistic to expect victims to complain to persons they do not know and have never met. Adoption of the Eleventh Circuit's standard would, in practical terms, come close to a grant of immunity.

The Eleventh Circuit's application of its "high enough in the hierarchy" precondition for imputing notice demonstrates the rule's destructive effects on Title VII rights. In *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996), for instance, two employees of a Pizza Hut restaurant complained of sexual harassment by a co-worker to the restaurant manager. Although the court found that the restaurant manager had "managerial responsibilities at the Pizza Hut facility," the court held that the complaints did not constitute notice to the employer because the manager was not high

enough in the corporate hierarchy. Even though the employer presumably vested in the manager the authority and duty to end the harassment, the manager's knowledge was not imputed to the employer. If an assistant cook at the Pizza Hut were to report to the manager that the head cook was cooking with tainted meat, can anyone doubt that the restaurant owner would be liable if the manager neither stopped the practice nor reported it to higher corporate officials?

The lower court's companion rule that notice to a supervisor does not count if the official receiving notice was selected because of high repute among the employees or because he or she was considered friendly is even more destructive of Title VII rights. To whom can a fearful employee be expected to complain, if not an official of the defendant who is known to be both trustworthy and sympathetic?

The most troubling aspect of the Eleventh Circuit's dual conditions for effective notice is that they are counter-intuitive. They could not be predicted by a reasonable victim, and victims would have to speak to a lawyer or conduct legal research on their own to find out the person to whom they should complain. Even then, they would run the risk of guessing incorrectly. For example, the opinion below does not state whether a complaint to the Director of Recreation would have sufficed. A victim who tries complaining at this level may have the rug pulled out from under her feet years later.

These restrictions are inconsistent with the statute. This Court has previously emphasized that even the administrative process under Title VII has to be simple enough for a lay person

to trigger,[10] and it would seem to follow that any notice requirements would have to be comparably easy to satisfy.

The undisputed testimony of the Director of Personnel was that Gordon, both as a Lieutenant and as a Captain, had an affirmative obligation to report to higher officials both his observations of sexual harassment and the complaints made to him. As the Seventh Circuit has held, where an employee complains of harassment to a supervisory employee "who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it," the employer should be deemed on notice of the harassment. *Young v. Bayer Corp.*, 123 F.3d 672, 675 (7th Cir. 1997); *see also Torres v. Pisano*, 116 F.3d 625, 636-637 (2d Cir.), *cert. denied*, 66 USLW 3385 (U.S., Dec. 1, 1997) (No. 97-578).

This rule, rather than one that relies on a formalistic distinction between "low-level" and "higher" management, focuses on the practical, more grounded distinction between those who could reasonably be expected to take action to end the harassment, and those who could not be so expected. *Young*, 123 F.3d at 675. When an employee informs a supervisor of harassment, it is generally reasonable for that employee to assume that a supervisor is authorized to receive such information and will take appropriate action. This is particularly true where the employer expects employees to follow the chain of command and has not notified them of any different procedure.

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[10] *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972) ("Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.").

Under traditional agency law, "[u]nless the notifier has notice that the agent has an interest adverse to the principal, a notification given an agent is notice to the principal if it is given: (a) to an agent authorized to receive it; [or] (b) to an agent apparently authorized to receive it . . . ." RESTATEMENT OF AGENCY 2D [hereafter, RESTATEMENT] § 268(1)(a), -(b). Because of Gordon's supervisory authority, petitioner and the other lifeguards could reasonably believe that he was authorized to receive complaints of harassment. The fact that they may have also viewed him as a friend or held him in high repute would not be incompatible with such a perception. A rule that knowledge obtained by an agent on the basis of friendship or high repute could not be imputed to the principal is irrational. Friendship or high repute with the notifier would not in itself relieve the agent from, or interfere with the agent's performance of, the duty to act or give the principal information. If anything, it is fair to assume that a supervisor with a high reputation for integrity is more, not less, likely to report this conduct up the chain of command. Hence, there is no reasonable basis not to impute such knowledge to the principal.

Moreover, Personnel Director Bender's testimony makes clear that this case is no different from the general run of cases: it was within the scope of Gordon's employment to observe problems and receive information of significance to the employer, and either resolve the problems himself or report the problems to someone who could resolve them. That is the reason employers use supervisors. Under traditional agency law, Gordon's negligent failure to discharge a duty within the scope of his employment renders the employer liable. RESTATEMENT § 219(1). The discouraging advice Gordon gave to the female lifeguards who complained to him was also given within the scope of his employment as a supervisor, for one of the

principal roles of supervisors is to explain to employees the employer's imperatives and procedures.

That Gordon did not actually report the information to the company should not negate the City's liability. Under agency principles, "the liability of a principal is affected by the knowledge of an agent concerning a matter . . . upon which it is his duty to give the principal information." RESTATEMENT § 272 and comment a. In the employment context, a master's liability is affected "because of the knowledge of, or notification to, a servant, subservant, or subagent which the servant or subagent had a duty to act upon or to communicate to the agent or to the principal because of his employment or apparent employment."[11] *Id.*, § 283(a) and comment *a*, illustration 2.

A rule that imputes only knowledge of "higher", rather than "low-level," management to an employer, fails to reflect the realities of agency and corporate organization. It is common sense that employers generally expect that employees, in reporting workplace concerns, speak with their supervisors, rather than "higher management" of a corporation. Employees also usually assume that they are to seek guidance or help from their supervisors. From concerns about workplace supplies to problems with customers or co-workers, these matters are brought to the attention of supervisors with the reasonable

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[11] *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 876–77 (9th Cir. 1989), *cert. denied*, 498 U.S. 814 (1990), for example, held that the defendant was bound by the knowledge of plaintiff's immediate supervisor that plaintiff's frequent absences from work were due to his cluster migraine condition although the supervisor failed in his duty to report the plaintiff's condition, thus rendering the defendant liable for any failure to make a reasonable accommodation under Washington's disability discrimination law.

expectation that the supervisor has the authority either to rectify the situation or to bring it to the attention of appropriate others. These expectations comport with one of the very reasons for the existence of multiple levels of supervisors: the need to shield "higher" management from being flooded with employee concerns and complaints, and the ability of lower-level supervisors to filter up those that are most important. Because employees in large companies rarely seek out, indeed rarely have any knowledge of or familiarity with, higher management, a notice requirement that employees report complaints of sexual harassment to higher management will effectively allow employers, by imposing many levels of supervisory employees, "to buy immunity from the duties Title VII places on employers." *Young v. Bayer Corp.*, 123 F.3d at 675.

Title VII requires no less. The employer can guard against a supervisor who fails to report harassment through improved personnel selection, training, evaluation, and discipline. None of these tools was used here. The employee has no such tools, particularly where the employer has given her no information that the "chain of command" that is supposed to be used for all things is not really supposed to be used for harassment complaints.

III. The Lower Court's Requirement that Employees Use an Unadvertised Complaint Procedure To Provide Notice to the City Conflicts with Title VII

By imposing restrictions on both imputed and constructive knowledge, the lower court effectively requires racial and sexual harassment victims to file an internal complaint to place the employer on notice. If there is an internal procedure, the employee must presumably comply with it; here, petitioner's

effort to work within the "chain of command" as required by the employee handbook was held inadequate. An employee like the petitioner is required by the lower court's opinion to come up with her own procedure[12] and hope it will survive the defendant's attack, as it failed to do here. In enacting the Civil Rights Act of 1991, Pub. L. 102–166, 105 STAT. 1071, Congress rejected the imposition of a much lesser burden on sexual harassment victims. Under the standards of *Bob Jones University v. United States*, 461 U.S. 574, 599–602 (1983), this Court may consider that action as relevant to its own construction of Title VII.

President Bush's proposed alternative to the 1991 Act. Introduced in the House by Rep. Michel, § 8(a) of the substitute would have amended § 703(a) of Title VII, defining unlawful conduct by employers, by adding a new subsection (3):

> (3) to harass any employee or applicant for employment because of that individual's race, color, religion, sex, or national origin: *Provided, however*, That no such unlawful employment practice shall be found to have occurred if the complaining party failed to avail himself or herself of a procedure, of which the complaining party was or should have been aware, established by the employer for resolving complaints of harassment in an effective fashion within a period not

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[12] *E.g.*, *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 262 (4th Cir. 1996), held that the defendant was not liable for a sexually hostile working environment created by her supervisor where the plaintiff knew that her supervisor reported to a corporate officer to whom she could complain, and where she did not complain. The opinion does not discuss any internal complaint system.

exceeding ninety days.

137 CONG REC. H3897 (daily ed., June 4, 1991). Rep. Michel identified the bill as the President's bill. *Id.* at H3898. The Section-by-Section analysis supporting the proposal when introduced stated that it was intended "to encourage employers to adopt meaningful complaint procedures to redress harassment and to encourage employees to use them." 137 CONG REC. H1666 (daily ed., March 12, 1991). Supporters of the 1991 Act sharply criticized this part of the proposal, *inter alia*, as imposing undue burdens and risks on the victims of sexual harassment. *E.g.*, remarks of Rep. Kennelly, 137 CONG REC. H3850 (daily ed., June 4, 1991); remarks of Rep. Edwards, *id.* at H3899; colloquy of Reps. Edwards and Hyde, *id.*; remarks of Rep. Clay, *id.* at H3900; remarks of Rep. Mink, *id.* at H3904. The House rejected the President's substitute bill by a vote of 266 to 162. *Id.* at H3908. The lower court has impermissibly imposed on harassment victims a requirement Congress has resoundingly declared should not be placed on them.

IV. Section Chief Terry's and Lieutenant or Captain Silverman's Knowledge of Their Own Conduct Can Be Imputed to the City

Terry and Silverman were under the same obligation as Gordon to report their own knowledge of their own harassment to higher levels of City management. The "assistance of cover-up" exception to the duty to report in RESTATEMENT § 280 does not apply where the agent is acting adversely to the principal and his failure to reveal his information "results in a violation of a contractual or relational duty of the principal to a person harmed thereby." RESTATEMENT § 282(2)(a). In the employment relationship, masters are responsible for the

knowledge of their servants without any exception for servants covering up their misdeeds. RESTATEMENT § 283(a).

There can be no reasonable contention here that Terry and Silverman were under no duty to report because their conduct could reasonably be seen as innocent or as not offensive. The record herein is replete with both statements and actions that cross the bounds of acceptable workplace conduct. Even if the supervisor is the person engaging in such actions, both agency law and Title VII require that the supervisor's knowledge of such unacceptable behavior be imputed to the City. Any other rule would substantially undermine Title VII's guarantee of a harassment-free workplace. For example, it would immunize an employer even when a supervisor makes repeated threats of adverse actions if an employee will not submit to his demands for sexual favors, if the employee fails to submit an internal complaint for any reason, and if the supervisor ultimately rapes the employee.[13] Such an approach rewards employers that fail to select, train, evaluate, and discipline supervisors so that they will refrain from, and stop others from engaging in, intolerable conduct. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), held that the courts' discretion as to remedy "must therefore be measured against the purposes which inform Title VII," and *amici* respectfully suggest that following the same approach will best serve the purposes of Congress in prohibiting sexual harassment.

Amici's suggestion of an objective test builds upon the experience of the courts under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), for purposes of determining whether a public official is entitled to qualified immunity under 42 U.S.C. § 1983.

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[13] *Gary v. Long*, 59 F.3d at 1397–98.

It is consistent with both agency law and Title VII's purposes.

V. The City is Liable Because Terry's and Silverman's Actions Were Aided by the Agency Relationship

A master is generally liable for a servant's tort where the servant was aided by the agency relationship in accomplishing the tort. RESTATEMENT § 219(2)(d), second clause. The Third and D.C. Circuits have treated the two clauses of subsec. (d) as conjunctive rather than alternative—despite the word "or" between them—so that an employer policy against sexual harassment bars any finding of "apparent authority" and therefore shields the employer from liability.[14] The Second and Tenth Circuits correctly read "or" as disjunctive.[15]

The facts here show that Silverman could only have accomplished much of his harassment because his supervisory position enabled him to impose his presence on female lifeguards for long periods of time; they could not throw him out or tell him to get lost, as they could with a co-worker. Terry could only have made his harassing comments during hiring interviews by being in charge of the process.

---

[14] *Bouton v. BMW of North America*, 29 F.3d 103, 109 (3d Cir. 1994); *Gary v. Long*, 59 F.3d at 1397–98. *Gary* held that the defendant was not liable where its supervisor used his authority to order the plaintiff to help him conduct an inspection of a secluded storage facility, assaulted her en route, and raped her. It is difficult to imagine a more direct use of the agency relationship to accomplish a wrong.

[15] *Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1445–46 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S., Aug. 6, 1997), No. 97-232.

Moreover, a reasonable factfinder could draw the inference that sustained and extremely frequent levels of unwelcome sexual remarks could only occur and continue over a long time because the key participants were supervisors. It is unrealistic to think that mere co-workers can, all on their own, set such a tone and sustain it for long periods. The purposes of Title VII require a standard rendering an employer liable when a supervisor has directly or indirectly used his authority to engage in or condone harassment.

VI. Constructive Notice Should Not Be Defeated Simply Because A Work Site is "Remote"

The lower court held that the geographic remoteness of a hostile working environment from the center of the employer's operations makes it impossible to impute constructive knowledge to the City, and repeated this in different form by stating that the knowledge of local officials cannot be imputed to the City precisely because they are not high enough in the hierarchy to be at City Hall. Pet App. 15a–16a.

Title VII simply cannot be read as tolerating two different standards of conduct, depending on whether it occurred at headquarters or in the field, but this will be the inevitable result of barring constructive notice at all but an employer's central site.

CONCLUSION

Amici respectfully urge that this Court clarify the applicable principles of law and reverse the judgment below.

Respectfully submitted,

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No. 97-282

In The

Supreme Court of the United States

October Term, 1997

BETH ANN FARAGHER,

Petitioner,

v.

THE CITY OF BOCA RATON, a political subdivision of the State of Florida,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME

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MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME

Now comes amicus curiae National Employment Lawyers Association (NELA) and respectfully requests this Court to grant leave to file its amicus curiae brief out of time. In support of the motion, amicus shows as follows:

1. In this Court's November 14, 1997 Order granting certiorari in the above-captioned case, this Court indicated that petitioner's brief (and accordingly all amicus briefs submitted in support of petitioner) were to be filed with the Clerk on or before 3:00 p.m. on Monday, December 29, 1997. This Order also indicated that Rule 29.2, which would permit amicus NELA's brief to be considered timely filed if postmarked on this date, did not apply.

2. Amicus counsel was aware of the deadline contained within this Court's Order, and communicated this information to Cockle Printing, the printing company with whom amicus had contracted to provide printing services, in order to ensure the brief was filed in a timely manner. However, this information was unfortunately miscommunicated and not conveyed to the appropriate individual on Cockle Printing staff. Cockle Printing transmitted the brief via Express Mail overnight delivery on December 29, believing this to constitute a timely filing under Rule 29.2. Ms. Kathleen Tycz of this Court's staff has informed amicus counsel that the brief was actually received by the Court on December 30, 1997.

Accordingly, amicus curiae respectfully requests that its brief submitted in the above-captioned matter be considered timely filed by this Court.

Respectfully submitted,

MARGARET HARRIS
Counsel of Record

No. 97-282

In The

Supreme Court of the United States

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BETH ANN FARAGHER

Petitioner,

v.

THE CITY OF BOCA RATON, a political subdivision of the State of Florida

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BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs before this Court, singly or jointly with other amici. Some recent cases include *Oncale v. Sundowner Offshore Services, Inc.*, No. 96-568 (1997); *Oubre v. Entergy Operations, Inc.*, 117 S.Ct. 1466 (1997); *Robinson v. Shell Oil Co.*, 117 S.Ct. 843 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); and *Hazen Paper Co. v. Biggins*, 508 U.S. 948 (1993).

NELA members represent thousands of individuals in this country who are victims of unlawful employment discrimination, including sexual and racial harassment. Both before and since this Court's opinion in *Meritor Savings v. Vinson*, 477 U.S. 57 (1986), courts have struggled to articulate the circumstances under which an

---

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. With the exception of the fact that counsel for petitioner, William R. Amlong, is a member of NELA and, as such, pays general membership dues, no persons other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

employer is liable for conduct that rises to the level of actionable sexual harassment.

The interest of NELA in this case is to protect the rights of its members' clients, by ensuring that Title VII's goal of eradicating employment discrimination is fully realized. This cannot happen when the victims of unlawful conduct inflicted by supervisors are largely left without remedy. NELA submits this brief because of the importanee of the issues at bar to furthering its goals.

INTRODUCTION

In NELA's view this case presents two important questions. First, when is an employer vicariously liable for sexual harassment by one of its supervisors? Second, when is an employer directly liable for sexual harassment by a supervisor because it is on notice that the harassment is occurring and has failed to take corrective action?[2]

When first considering the question of employer liability for sexual harassment conducted by supervisory personnel, this Court, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), rejected two opposing contentions. First, it stated that employers are not always automatically liable for sexual harassment of an employee by her

[2] The issues of *quid pro quo* sexual harassment or non-supervisorial co-employee work environment harassment was not addressed in this brief.

supervisor. Second, it held that "absence of notice to an employer . . . does not necessarily insulate that employer from liability." *Id*. at 72. Instead, this Court referred parties and courts to the Restatement (Second) of Agency ("the Restatement"), which employs a number of tests for determining whether an employer is liable for the acts of its supervisors, and its employees in general. The Court cited Section 219 of the Restatement, which provides:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment;
>
> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Courts on both the trial and appellate levels are in disarray about which, if any, of these principles should be applied in hostile work environment cases, particularly when the harasser is the victim's supervisor. They have thus rendered confusing and inconsistent decisions interpreting an employer's liability for sexual harassment by a

supervisor. David Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 Cornell L. Rev. 66, 72 (1995) (hereafter, *Oppenheimer, "Title VII Liability"*). This disarray has led to decisions in which the victims of sexual harassment have no effective recourse and their employers have no incentive to change their conduct. These decisions not only misapply the law of agency, but also operate to deprive employees of their statutory rights.

The decision of the court of appeals in the case at bar creates an insurmountable barrier for individuals whose supervisors sexually harass them in the workplace, while thus absolving employers of their responsibilities to safeguard the workplace from discriminatory conduct. By misapplying well-accepted agency principles, the rule announced by the appellate court rewards employers who delegate broad authority to supervisors but then neither act proactively to prevent sexual harassment by clearly communicating its intolerance of that conduct nor properly supervise its managers. The appellate court would instead predicate employer liability on the employees' ability to run the gauntlet of seeking out and complaining to a variety of management officials about the sexual harassment by their supervisors. This rule does not further the goals of Title VII, but instead closes the doors of relief to many sexual harassment victims and removes an incentive to an employer to prevent and eradicate a sexually hostile work environment: the threat of corporate liability. Under the Eleventh Circuit's standard, employers with supervisors who perpetuate the existence of offensive language, gestures, touching and

other illegal conduct in the workplace avoid liability altogether.

NELA believes that this Court's application of generally accepted agency principles in cases involving hostile work environment sexual harassment by supervisors will end the confusion. The tests NELA sets forth below, if adopted by this Court, serve Congress' twin goals of (1) deterring sexual harassment and (2) compensating victims of this illegal conduct. (Civil Rights Act of 1991, P.L. 102-166 H. Rep. (Education and Labor Committee) No. 102-40 pages 14, 64-69 (April 24, 1991)).

NELA recognizes that many, if not most, employers covered by Title VII have written policies prohibiting discrimination in general and sexual harassment in particular. Despite these policies, illegal harassment in the workplace has not been abolished. The mere existence of such a written policy should not immunize the employer for acts of supervisory harassment, but is relevant evidence for at least four reasons:

(1) It reduces the likelihood that harassment will occur;

(2) It increases the likelihood that harassment will be reported;

(3) It may reduce the availability of punitive damages; and

(4) It reduces the likelihood of a finding of constructive notice.

By contrast, the absence of a meaningful anti-harassment policy is relevant evidence of the employer's own carelessness and recklessness. How that anti-harassment policy is crafted, how it is disseminated, whether

distribution of the policy is accompanied by adequate training and how it is implemented in real life, day in and day out in a particular workplace, are all questions of fact, the importance of which depend on the facts of each case.

Amicus NELA advocates a middle ground between (1) the argument that employers are always automatically liable for sexual harassment committed by supervisors and (2) the argument that employers are liable for supervisory sexual harassment only if it is brought to the attention of "higher management" other than the perpetrator. NELA's proposal is pragmatic, realistic, workable, and based upon time-honored common law agency principles.

SUMMARY OF ARGUMENT

NELA urges this Court to hold that under principles of the law of agency, employers may be vicariously liable for hostile work environment sexual harassment perpetrated by their supervisors. Under respondeat superior, employers should be held responsible for harassment by supervisors when committed within the supervisors' scope of employment. Employers should also be held responsible when the employer/supervisor relationship aided the supervisor in carrying out the harassment or the supervisor acted with apparent authority.

Should a supervisor's sexual harassment of a subordinate be within the scope of his employment, the employer is, without exception, liable for that conduct. Similarly, employers are vicariously liable for sexual

harassment by their supervisors should the supervisor have the apparent authority to engage in the conduct, or should he be aided in the harassment by the existence of the agency relationship.

Amicus further urges this Court to hold that employers are directly liable for work environment sexual harassment when they are careless, reckless or at "fault." The most common form of direct employer fault in the sexual harassment context is its failure to take appropriate corrective action when it knows, or should know, that harassment is occurring.

The proper application of agency principles to this case result in a conclusion that the City of Boca Raton is liable for the sexual harassment endured by Faragher under three different theories of agency. First, Terry himself was vested with sufficient authority that his sexual harassment was within the scope of his employment. Second, Terry and Silverman were acting within the scope of their apparent authority. And, finally, even though the victims did not complain to someone in "higher management," they complained to a supervisor with sufficient authority such that his notice is properly imputed to the employer and, having thereafter failed to take prompt remedial action, the employer is liable for its own carelessness or recklessness.

I. AN EMPLOYER MAY, UNDER PROPER CIRCUMSTANCES, BE VICARIOUSLY LIABLE FOR SUPERVISORY HARASSMENT

The appeals court held that there can be no vicarious liability for a supervisor's sexual harassment of a subordinate, unless the victim takes her complaint to higher management. While the appellate court did not identify what person or title would qualify as higher management under the facts of this case, it obviously required that the individual be someone above the harassing supervisors. Based on the application of traditional agency principles the appellate court's ruling is erroneous.

In understanding the modern law of agency, there is no better starting place than the American Law Institute's Restatement (Second) of Agency, published in 1957. The Restatement's section on respondeat superior provides that "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement 219(1). Even when the supervisory harasser acts outside the scope of his employment, the master is liable if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." Restatement 219(2)(d).

Given the degree of authority that workplace supervisors have in our society, the risk that such an individual will abuse his position of power over a subordinate and subject her to unlawful conduct appropriately falls on the employer when the harasser has acted within the scope of his employment or when he acts with apparent authority.

A. EMPLOYERS ARE VICARIOUSLY RESPONSIBLE FOR SEXUAL HARASSMENT BY THEIR SUPERVISORS WHO ACT WITHIN THE SCOPE OF THEIR EMPLOYMENT.

Most fundamentally, an employer is liable for its own acts of discrimination and harassment. "Since the acts of a corporation are acts of human beings, to say that the corporation has committed some wrong . . . simply means that someone at the decision-making level in the corporate hierarchy has committed the wrong." *Hunter v. Allis Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir. 1987). Marine Safety Chief Terry constitutes such a person because his sexual harassment was within the scope of his employment.

This raises one of the most difficult issues in the application of agency law to sexual harassment – when is an employee who harasses another employee acting within the scope of employment? In the case at bar, the majority in the *en banc* decision ruled that harassment is within the scope of employment only when it is "authorized" by the employer – that is, when the employer has directed employees to engage in harassment or given them permission to do so. This is clearly wrong, because it is well established in the law of agency that unauthorized acts, and even forbidden and illegal acts, may be within the scope of employment. Restatement (Second) of Agency (1957) Sections 230, 231; *Ira S. Bushey v. United States*, 398 F.2d 167 (2d Cir. 1968) (Friendly J) *Lyon v. Carey*, 533 F.2d 649 (D.C.Cir. 1976). A principled application of the law of agency requires a holding that, when the employer vests a supervisor with significant

control over the plaintiff's hiring, firing, or conditions of employment, the employer is liable for that conduct.

In answering the "scope of employment question," judicial notice must be given to the breadth of delegated authority in a modern workplace. Employers act through their supervisors. They are the eyes, ears, and, most importantly, the voice of the employer in all interactions with employees. They give instructions, oversee operations, direct the activities of their subordinates, provide and interpret regulations, and mediate interactions between employees. And, although not true of all supervisors, many are in charge of large numbers of employees, and are given autonomy in controlling the work environment of their subordinates. As a result, a determination of whether an act took place in the scope of employment requires a searching examination of the supervisor's authority over the plaintiff, the overall structure of the workplace, and when and where the acts took place. *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 (4th Cir. 1995).

In this case, Marine Safety Section Chief Terry ran the unit with great autonomy and independence from City Hall and it was in this unit that, in the District Court's finding, he promoted "an environment where female lifeguards were considered fair game for uninvited touching and offensive remarks." (Dist. Ct. Op. App. 89a) Terry was the "decision-maker" insofar as the lifeguards were concerned. Terry wielded the power to encourage or prevent the harassment of Faragher and the other women under his command. He held the authority to supervise

all aspects of their work assignments, to control the lifeguards' daily duties, including designating work assignments and supervising physical fitness routines, to give oral reprimands and place disciplinary actions in personnel files, and to interview and select new lifeguards. (Dist. Ct. Op. App. 92a-93a). While theoretically he was required to obtain higher management's approval of his hiring decisions, no one was hired without Terry's recommendation during the 20 years that Terry was Marine Safety Chief.(This is precisely the type of empirical fact that is uncovered by a searching exam of the real life functioning of this city which is the methodology NELA advocates.) On these facts, the City of Boca Raton must be held vicariously liable for Terry's harassment of Faragher. The level of autonomous control that Terry exercised over Faragher's conditions of employment proves that his acts of offensive grabbing and touching and other demeaning conduct were within the scope of his employment.

B. EMPLOYERS MAY ALSO BE VICARIOUSLY LIABLE WHEN THE HARASSMENT IS OUTSIDE THE SCOPE OF THE HARASSER'S EMPLOYMENT

Even when the sexual harassment does not fall within the scope of the harasser's employment, Restatement 219(2) provides that the employer may be liable for the harasser's conduct. Subsection (d) of Section 219 provides that an employer is liable for the conduct of its servant, even though acting outside the scope of employment, if "the servant purported to act or to speak on behalf of the principal and there was reliance upon

apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

This particular rule of vicarious liability is particularly applicable in the sexual harassment context:

> Given the process by which harassment occurs in the workplace, the supervisor's opportunity to engage in sexual harassment necessarily arises from the existence of the agency relationship. Certainly, from the employee's point of view, the supervisor's ability to harass her arises precisely because the agency relationship affords her supervisor the authority to call her into his presence, to retain her in his presence over her objections, to place her in a compromising position, and to a large extent encroach upon her personal privacy. Harassment occurs when there is an imbalance of power in the workplace – an imbalance arising from a relationship in which the supervisor, empowered by the principal, oversees the disempowered subordinate employee (footnote omitted). Even when the harassment is unrelated to job functions, the level of trust and authority conferred upon the supervisor by the employer affords the supervisor the opportunities denied other employees or strangers. When the supervisor abuses that trust and authority, by harassing a subordinate, the law of vicarious liability holds the employer responsible.

Oppenheimer, "Title VII Liability", supra, at pp. 89-90

Whether the supervisor possessed the apparent authority to carry out the acts of sexual harassment is a question of fact. Several appellate courts, recognizing the doctrine of vicarious liability, have held that an employer

may be liable, under traditional agency principles, for sexual harassment committed by a supervisor who had the apparent authority to commit the harassment. *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1347 (10th Cir. 1997) (underground shift foreman was plaintiff's supervisor, had authority to order her into particular areas of the mine, and was involved in the disciplinary process); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1306 (2d Cir. 1995) (supervisor convened business dinner and implied that employees were required to attend; supervisor then fostered alcohol consumption at the dinner, which led to sexual assault); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-186 (6th Cir. 1992) (supervisor told plaintiff that she "owed him" for all that he had done for her as her supervisor, and varied "her raises, hours, autonomy and flexibility" according to her responsiveness to his sexual advances); *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), vacated in part, 900 F.2d 27 (4th Cir. 1990).

Applying this agency principle, the City of Boca Raton is vicariously liable for Faragher's sexual harassment because Terry and Silverman had apparent authority to conduct their acts of harassment. Silverman was encouraged in his behavior by the example set by Terry. And, Gordon warned Faragher that the City would not care if complaints were made to anyone above Terry's head. This is what Professor Oppenheimer meant when he said "certainly from the employee's point of view, the supervisor's ability to harass . . . arises precisely because of: the agency relationship. . . . " (*Oppenheimer, Title VII Liability* at 89)

C. CONGRESSIONAL INTENT AND PUBLIC POLICY SUPPORT THE APPLICATION OF VICARIOUS LIABILITY TO SEXUAL HARASSMENT BY SUPERVISORS

Under the modern view of respondeat superior, there are three principal reasons for imposing vicarious liability: deterrence, compensation, and risk spreading. Each goal is furthered by a rule that imposes vicarious liability on employers when their supervisors harass subordinate employees while acting in the scope of their employment. Such a rule clearly aids the goal of deterrence; employers who know they will be vicariously liable for sexual harassment committed by their supervisors will be motivated to develop and implement effective anti-harassment policies. They will have a meaningful incentive to take all reasonable steps to prevent harassment from occurring.

A rule of vicarious liability also furthers the goal of compensation for harm, which the Congress added to Title VII in the 1991 Civil Rights Act. This is particularly true since every Circuit, except the First, has held that there is no individual liability under Title VII. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996); *Dici v. Com. of Pa.*, 91 F.3d 542, 552 (3d Cir. 1996); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir.), *cert denied*, 513 U.S. 1058, 115 S.Ct. 666, 130 L.Ed.2d 600 (1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir.), *cert denied*, 513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed. 2d (1994); *Wathen v. General Electric Co.*, 115 F.3d 400, 405 (6th Cir. 1997); *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995); *Bonomolo-Hagen v. Clay Central-Everly Community School Dist.*, 1997 WL 467573 (8th Cir. 1997); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert denied*, 510 U.S. 1109, 114 S.Ct. 1049, 127 L.Ed.2d 372 (1994); *Haynes v. Williams*, 88 F.3d 898, 900 (10th Cir. 1996); *Smith v. Lomax*, 45 F.3d 402, 405 (11th Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir.), *cert denied*, ___ U.S. ___,116 S.Ct. 569, 133 L.Ed.2d 493 (1995). The First Circuit has declined to answer the question, describing the issue of individual liability under Title VII as "potentially difficult." *Margarita Serapion v. Fred H. Martinez*, 1997 WL 394605 (1st Cir. 1997); *Morrison v. Mills*, 108 F.3d 429, 1st Cir. 1997).

Congress did not intend that employees whose civil rights are violated be left without a remedy. Congress enacted the Civil Rights Act of 1991 in part to provide monetary remedies for employees who have been damaged by discrimination, to compensate them for resulting injuries and to deter discrimination. Congress recognized that Title VII, prior to the enactment of the Civil Rights Act of 1991, forced the victims of harassment rather than the perpetrators of the harassment to bear the non-wage costs of discrimination. Congress believed that, by making employers liable for all losses, it would serve as a necessary deterrent to future acts of discrimination and encourage employers to design and implement remedies for intervention and prevention. (Civil Rights Act of 1991, P.L. 102-166 H. Rep. (Education and Labor Committee) No. 102-40 pages 14, 64-69 (April 24, 1991)).

A rule of vicarious liability, such as advocated by NELA imposes the burden of risk spreading to the party best able to spread the risks; if the risks posed by sexual harassment are borne by victims alone, they will be borne

by those least able to spread the risk. If they are borne by employers they may be shifted more broadly in the marketplace to customers, clients and owners.

As a comment to the Restatement explains: "It would be unfair for an enterprise to have the benefit of the work of its agents without making it responsible to some extent for their excesses and failures to act carefully. The answer of the common law has been the creation of special agency powers or, to phrase it otherwise, "the imposition of liability upon the principal because of unauthorized or negligent acts of his servants and other agents." Restatement, Section 8A, cmt. a. A rule of vicarious liability protects employees and encourages employers to take all prudent steps to reduce the likelihood that harassment will occur, and to insure or self-insure against the inevitable cases in which their efforts are insufficient.

II. AN EMPLOYER IS DIRECTLY RESPONSIBLE WHEN IT FAILS TO PROTECT EMPLOYEES FROM SEXUAL HARASSMENT OF WHICH IT HAS ACTUAL OR CONSTRUCTIVE KNOWLEDGE.

In addition to these situations in which the employer can be found to be liable regardless of its lack of knowledge, an employer may also be held responsible for its own conduct in failing to prevent or timely stop the harassment. *See*, generally, David Oppenheimer, *Negligent Discrimination*, 141 U.Pa.L.Rev. 899, 944-67 (1993). Many courts refer to this as the employer's "direct liability" – and the applicability of this principle of employer liability is one upon which the circuits generally agree. *See*,

e.g., Jansen v. Packaging Corp. of Am., 123 F.3d 490, 510 (7th Cir. 1997) (and cases cited therein); *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 577 (10th Cir. 1990); *Saxton v. Am. Tel. & Tele. Co.*, 10 F.3d 526, 535 (7th Cir. 1993).

Under this principle of agency, articulated in Restatement 219(2)(b), an employer is held liable if it has either actual or constructive notice[3] of the harassment, yet fails to take prompt remedial action to stop harassment in its tracks. *See, e.g., Hirschfeld v. New Mexico Corrections Department*, 916 F.2d 572, 577 (10th Cir. 1990). This principle dovetails Title VII's requirement that an employer protect employees from racial, ethnic, religious or sexual harassment of which the employer has notice. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *DeGrace v. Rumsfeld*, 614 F.2d 796 (1st Cir. 1980); *Katz v Dole*, 709 F.2d 251 (4th Cir. 1983). *See also*, Restatement (Second) of Agency (1957) Sections 507 (employers' duty to provide competent supervisors); 508 (duty to make and enforce rules); 213 (employers' duty to

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[3] There are various means by which constructive notice can be proved. If, for example, the sexual harassment was open and obvious and should have therefore been observed by the agent, there is constructive notice. Alternatively, if the agent knew that the supervisor had a tendency to behave obnoxiously and abuse other employees there is constructive notice. Or, if the harassment would have been discovered by the exercise of reasonable management skills, again there will be constructive notice. The existence of an effective anti-harassment policy may help defeat a claim of constructive notice while the lack of an effective policy may be evidence of constructive notice.

third persons to give proper orders, make proper regulations, select and employ appropriate persons, and select and supervise employees with due care).

The question, though, becomes, *whose* knowledge is properly attributed to the employer, such that a failure to act properly after the receipt of that information leads to the employer's liability? One method the Restatement articulates for proving employer liability is:

> (1) Unless the notifier has notice that the agent has an interest adverse to the principal, a notification given to an agent is notice to the principal if it is given:
>
> (a) to an agent authorized to receive it;
>
> (b) to an agent apparently authorized to receive it;
>
> (c) to an agent authorized to conduct a transaction, with respect to matters connected with it as to which notice is usually given to such an agent, unless the one giving the notification has notice that the agent is not authorized to receive it;

Restatement Section 268. *See*, also, Restatement Section 496 (notice to a supervisor of a dangerous condition constitutes notice to the employer).

This question was addressed in *Young v. Bayer Corporation*, 123 F.3d 672 (7th Cir. 1997) (Posner, C.J.). Rather than approaching this issue by asking at what level in a corporate hierarchy an employee "is" the corporation, the Seventh Circuit focused instead on a more practical question: did the information come to the attention of "someone who ought by specification of his duties or, failing

tnat, general norms of management to do something about it, either directly or by referring the matter to some other corporate employee?" Citing an earlier 2nd Circuit opinion in *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997), Chief Judge Posner held that the court's ruling – the information must either:

> (1) come to the attention of someone who
>
> (a) has under the terms of his employment, or
>
> (b) is reasonably believed to have, or
>
> (c) is reasonably charged by law with having, a duty to pass on the information to someone within the company who has the power to do something about it; or
>
> (2) come to the attention of such a someone.

123 F.3d at ___ (citations omitted).

Here the question of whether the employer has justly implemented throughout the workplace an effective anti-harassment policy is relevant. Employers that have well crafted, fully implemented anti-harassment policies should have many fewer harassed employees who claim not to know to whom they complain, or mid-level supervisors who claim they do not know where to take such complaints. Therefore, the failure to have an effective anti-harassment policy may itself be strong evidence of the employer's recklessness and a complaint to any supervisor would be sufficient to establish actual notice.

Or, as Professional Oppenheimer has written, "agency law should impose direct liability when an employer: (1) unreasonably fails to instruct its employees

to refrain from sexual harassment; (2) unreasonably fails to adopt rules, policies, and regulations designed to prevent harassment from occurring; (3) unreasonably employs people it knows or should know to be engaged in sexual harassment of other employees; (4) fails to properly supervise its employees to prevent harassment from occurring; (5) stands by and does nothing when it knows, or should know, that harassment is occurring; or (6) fails to prevent harassment that it could have reasonably prevented. In such cases the law of master and servant holds the employer directly liable for the harm caused by the employer's breach of duty." Oppenheimer, *Title VII Liability* at 98.

In the case now before the Court, the City's carelessness is established by the fact that notice of illegal harassment was given to an agent of the employer who was obligated to do something to ensure that the harassment stopped. He did nothing, and the employer therefore is directly liable. Training Captain Robert Gordon had actual knowledge that the female lifeguards, including the plaintiff Faragher, were suffering from Terry's and Silverman's sexual harassment. (Dist. Ct. Op. App. 82(a) of the cert. petition). Although Capt. Gordon was not in their chain of command, common sense and elementary management principles dictate that he report the harassment to someone who could end the harassment. While Gordon testified that he did not feel that it was his place to pass complaints on to his superiors, his failure to carry out his responsibilities does not immunize his employer from liability. If it did, employers would be encouraged to hire supervisors, who neglected their duties and abandoned their post – in a word, were incompetent. NELA

thus urges that the City of Boca Raton be held directly liable for its own recklessness by failing to take prompt remedial action once the lifeguards complained to Capt. Gordon that they were being sexually harassed.

CONCLUSION

In the twelve years since this Court's decision in *Meritor,* the lower courts have struggled to properly apply the law of agency to the problem of harassment in the workplace. This Court should cure the confusion by adopting a pragmatic, realistic, workable approach to the problem based upon time honored common law agency principles.

Respectfully submitted,

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No. 97-282

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BETH ANN FARAGHER,

Petitioner,

v.

THE CITY OF BOCA RATON, a political subdivision of the State of Florida,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether an employer may be held liable for a supervisor's "hostile environment" sexual harassment when the employer neither knew nor should have known of the harassment.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in several hundred cases before the Court, including numerous employment discrimination cases.[2]

This case concerns the circumstances under which an employer may be held liable for a supervisor's "hostile environment" sexual harassment under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.* Title VII covers virtually all employers with fifteen or more employees. 42 U.S.C. § 2000e(b). Most of the Chamber's

---

[1] The parties have consented to the filing of this brief. Counsel for the Chamber authored this brief in its entirety. No person or entity, other than the Chamber, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Burlington Indus., Inc. v. Ellerth*, No. 97-569; *Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

members are therefore subject to Title VII and are potential defendants in sexual harassment cases.

In *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Court held that Title VII creates a cause of action for sexual harassment, "whether or not it is directly linked to the grant or denial of an economic *quid pro quo*." *Id.* at 65. Harassment that does not involve a quid pro quo is known as "hostile environment" harassment. *Id.* The *Meritor* Court held that "hostile environment" harassment is actionable if it is "sufficiently severe or pervasive 'to alter the conditions of . . . employment and create an abusive working environment.'" *Id.* at 67 (citation omitted). Subsequently, the Court clarified that a "hostile environment" exists only if (1) the plaintiff subjectively perceives the environment to be abusive and (2) a reasonable person would agree. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

Although both *Meritor* and *Harris* defined sexual harassment, neither case established a definitive rule regarding the circumstances under which an employer may be held liable for its employees' misconduct. The reason the law is unsettled is that Congress has created a cause of action against employers, but has failed to specify the standard of care to which employers are to be held. Petitioner and her *amici* have filed briefs urging the Court to fill this gap by adopting a series of overlapping, convoluted employer liability rules based on the *Restatement (Second) of Agency* (1958) (the "*Restatement*").

Although the *Meritor* Court instructed the lower courts that Congress intended the use of "agency principles" in sexual harassment cases, 477 U.S. at 72, it cautioned that those principles "may not be transferable in all their particulars." *Id.* The lower court in that case had applied a strict liability standard, ruling that "an employer is absolutely liable for

sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct." *Id.* at 63. The Court rejected that standard, holding that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.* at 72. The Court declined, however, to issue definitive guidance as to when employers *are* liable for supervisory sexual harassment. As a result, the lower courts are in conflict regarding the appropriate standard to be applied.[3/]

Because the statute is silent on an employer liability standard and the *Restatement* does not adequately address the issue presented in this case, the Chamber urges the Court to resolve the conflict among the circuits by applying agency principles specially tailored to the objectives of Title VII. Under those principles, an employer should be held liable for

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[3/] *Compare, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (under negligence principles, "'liability exists where the [employer] knew or should have known of the harassment and failed to take prompt remedial action'") (quoting *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989)) *with Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.) (employer is strictly liable for hostile environment sexual harassment "if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship"), *cert. denied*, 512 U.S. 1213 (1994). For a circuit-by-circuit survey of the law, see Frederick J. Lewis and Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 Mem. St. U.L. Rev. 667 (1994).

hostile environment sexual harassment only if it knew or should have known of the harassment but failed to take prompt remedial action.

SUMMARY OF ARGUMENT

Neither Title VII nor the Court's precedents require that the *Restatement (Second) of Agency* be applied to determine whether an employer is liable for sexual harassment perpetrated by a supervisor. The *Restatement* is one source of common law agency principles, but it was not formulated to address issues such as supervisory sexual harassment. The common law rule that a master is liable for the torts of his servants committed while acting in the scope of their employment has little or no relevance, because sexual harassment is almost never within the scope of a supervisor's employment. For the same reason, a supervisor rarely has "actual authority" or "apparent authority" to commit sexual harassment. Moreover, as a practical matter, the *Restatement* rule imposing liability on a master whenever his servant is "aided in accomplishing [a] tort by the existence of the agency relation" is inconsistent with the Court's decision in *Meritor*, because the *Restatement* rule would in effect result in strict liability for supervisory sexual harassment.

Instead of relying on the *Restatement*, the Court should look to agency principles that comport with Congress's twin objectives of deterring sexual harassment and providing compensation to victims. Thus, an employer should be held responsible for a supervisor's hostile environment sexual harassment if and only if it knew or should have known of the harassment but failed to take prompt remedial action. This straightforward negligence standard comports with traditional principles of tort law, which generally impose liability only on a defendant that fails to exercise due care. Any decision to

impose liability on an employer that *does* exercise due care should be left to Congress — which has not spoken on this issue — because Congress is in the best position to balance the competing policy concerns inherent in such a departure from the normal rule.

ARGUMENT

I. THE *RESTATEMENT* DOES NOT PROVIDE AN APPROPRIATE MODEL FOR EVALUATING AN EMPLOYER'S LIABILITY FOR A SUPERVISOR'S HOSTILE ENVIRONMENT SEXUAL HARASSMENT

Petitioner and her *amici* begin with the premise that the *Restatement* is directly applicable to sexual harassment cases. But neither the statutory text nor the Court's decision in *Meritor* supports that premise.

Title VII provides that an "employer" may not discriminate against any individual based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). And Title VII defines the term "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . . ." 42 U.S.C. § 2000e(b).

Citing this language, the Court stated in *Meritor* that "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." 477 U.S. at 72. Thus, the Court held, employers are not "always automatically liable" for sexual harassment committed by supervisors. *Id.* The Court added that agency principles should serve as "guidance" in determining whether an employer is liable, but noted that "such

principles may not be transferable in all their particulars to Title VII." *Id.* And the Court cited the *Restatement* as *one source* of common law agency principles. *Id.* But as the United States Court of Appeals for the First Circuit noted ten years ago:

> The gist of the Court's holding is not to be gleaned from strict adherence to agency principles, which, as the Court noted, were to be mere "guidance," but rather from its definitive refusal to find employers "always automatically liable."

Lipsett v. University of Puerto Rico, 864 F.2d 881, 900 (1st Cir. 1988) (quoting *Meritor*, 477 U.S. at 72).

More recently, Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit surveyed the post-*Meritor* case law and concluded:

> The *Restatement* turns out to be hopelessly vague in its bearing on the issue of employers' liability for sexual harassment, being vaguely worded and addressed to other issues. So judges can in good faith reach opposite results when they seek guidance in the *Restatement* to employers' liability for sexual harassment by supervisory employees. . . .
>
> It is time that we threw away the crutch of the *Restatement* and, recognizing the differences between workplace sexual harassment and the actual subject matter of that antiquated screed, ask as an original matter — as I think the Supreme Court invited us to do in *Meritor* when it (under)stated that the common law of agency might not be fully transferable to sexual harassment — what the best regime of liability would be for these cases.

Jansen v. Packaging Corp. of Am., 123 F.3d 490, 509-10 (7th Cir. 1997) (Posner, C.J., concurring and dissenting), *cert. granted sub nom. Burlington Indus., Inc. v. Ellerth*, No. 97-569 (Jan. 23, 1998).

A review of the provisions of the *Restatement* relied upon by the petitioner and her *amici* readily demonstrates the wisdom of Chief Judge Posner's belief that they should not be applied to supervisory sexual harassment. For example, some of petitioner's *amici* argue that sexual harassment victims may recover on the theory that a master "is subject to liability for the torts of his servants committed while acting in the scope of their employment." *Restatement* § 219(1). (NELA Br. 9; AFL-CIO Br. 14-15.)[4] The court below aptly held, however, that "a supervisor's harassing conduct is typically outside the scope of his employment." (Pet. App. 9a.) An employee's conduct is within the scope of employment only if it is of the kind he is employed to perform, it occurs substantially within the authorized time and space limits of the employment, and the employee at least partially intends the conduct to serve the employer. *Restatement* § 228(1). Sexual harassment is not within the job description of any supervisor in any reputable business. *See, e.g., Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987). And harassment against an employee could hardly be thought by a supervisor to help the employer's business. *See Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir. 1986) (Posner, C.J., referring to

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[4] Petitioner mentions section 219(1) only in a footnote. (Pet. Br. 21 n.17.)

racial harassment). Consequently, because sexual harassment is almost never within the scope of a supervisor's employment, the courts regularly conclude that employer liability cannot be justified on this ground. *See, e.g., Andrade v. Mayfair Mgmt. Inc.*, 88 F.3d 258, 261-62 (4th Cir. 1996); *Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir.), *cert. denied*, 516 U.S. 1011 (1995); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 107 (3d Cir. 1994); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015-16 (8th Cir. 1988); *Hicks*, 833 F.2d at 1417-18.

One of petitioner's *amici* nevertheless cites section 231 of the *Restatement* for the proposition that the court of appeals' decision is "clearly wrong" because the "scope of employment" may encompass illegal acts. (NELA Br. 9.)[5] But the drafters made clear that this rule applies only to minor infractions, and not to "acts which are clearly inappropriate." *Restatement* § 231, comment *a*. Thus, NELA's argument does not serve the purposes for which it is intended, because the more egregious the harassment, the *less* likely it is to be found within the scope of employment.[6] If section 231 of the

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[5] Section 231 of the *Restatement* provides: "An act may be within the scope of employment although consciously criminal or tortious."

[6] The *Restatement* provides the following two examples:

> 1. A, P's chauffeur, to avoid a rough spot in the road while upon an errand for P, unlawfully drives upon the sidewalk. This conduct is within the scope of employment.
>
> 2. P employs A as a servant to dig a ditch in his land, near the road. Finding rock

Restatement governed sexual harassment cases, plaintiffs would be in the awkward position of attempting to minimize the degree of the transgression, while employers would be in the equally awkward posture of attempting to negate liability by arguing that the harassment is especially severe. This serves only to underscore Chief Judge Posner's thesis in *Jansen* that the *Restatement* is not a good framework for analyzing the law in this area.

Presumably recognizing that sexual harassment is normally outside the scope of a supervisor's employment, petitioner relies instead on *Restatement* § 219(2)(d)[7] to argue

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> present, A, although knowing that there is an ordinance against using dynamite near the highway, unnecessarily uses it to blast the rock, taking no precautions to guard travelers upon the road. If blasting is an abnormal and unexpectable method of executing the work for which A was employed, the blasting is not within the scope of employment.

Restatement § 231, illus. 1-2.

[7] Section 219(2)(d) of the *Restatement* provides:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . .
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence

that "[a]n employer is liable for the sexually hostile environment created by a supervisor . . . , regardless of whether it knew or should have known of that behavior, if the supervisor was 'aided in' perpetrating the harassment by the 'existence' of the powers he possesses as a supervisor." (Pet. Br. 21.)[8] According to petitioner, this standard requires a factual determination "in light of the record in each specific case." (*Id.*)[9]

As a practical matter, petitioner's argument runs afoul of *Meritor*'s holding rejecting an across-the-board strict

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of the agency relation.

[8] The Solicitor General also relies on this argument. (SG Br. 17-18.)

[9] Petitioner asserts that "[w]hether [a] supervisor is abusing [his] power is a fact-intensive inquiry." (Pet. Br. 19.) Thus, under petitioner's proposed standard, far fewer sexual harassment cases could be resolved by summary judgment.

According to one of petitioner's *amici*, the EEOC received 15,889 sexual harassment complaints in fiscal year 1997. (NELA Br. 21-22.) As Judge Coffey pointed out in *Jansen*, the number of employment cases filed in federal court has recently more than doubled (from 10,771 in 1992 to 23,152 in 1996). 123 F.3d at 540. Under petitioner's standard, many more of those cases would also have to be tried, exacerbating the existing problem "of having enough judicial manpower to adjudicate the incoming cases." Keynote Address of Chief Justice William H. Rehnquist, Symposium: The Future of the Federal Courts (Apr. 9, 1996), *reprinted in* 46 Am. U. L. Rev. 263, 270 (1996).

liability rule, because a supervisor almost always "will have been aided in some way in committing the tort by the position that he holds." *Barnes v. Costle*, 561 F.2d 983, 996 (D.C. Cir. 1977) (MacKinnon, J. concurring); *accord Jansen*, 123 F.3d at 563 (Manion, J., concurring and dissenting) (under the approach advocated by petitioner, "an employer nearly always is liable because the powers it bestows upon a supervisor 'enable' and 'help' him to harass a subordinate"). As a counterexample, petitioner posits that "anonymous harassment perpetrated by a supervisor is less likely to be aided by fear of supervisory power, since the victim could not be certain the perpetrator was in fact a supervisor." (Pet Br. 22 n.19.) Assuming such a thing as "anonymous harassment" actually exists in the real world, it is presumably extremely rare. Thus, petitioner's hypothetical scenario serves only to emphasize that her suggested standard is essentially equivalent to the strict liability rule the Court eschewed in *Meritor*.

Indeed, section 219(2)(d) of the *Restatement* was simply not designed to address torts like those at issue here. Section 219(2)(d) states a general rule of agency law, and subsequent sections of the *Restatement* set forth specific applications of that rule. The drafters' comments explain:

> Clause (d) includes primarily situations in which the principal's liability is based upon conduct which is within the apparent authority of a servant, as where one purports to speak for his employer in defaming another or interfering with another's business. See §§ 247-249. Apparent authority may also be the basis of an action of deceit (§§ 257-264), and even physical harm. See §§ 265-267. In other situations, the servant may be able to cause harm because of his position as an agent, as where a telegraph

> operator sends false messages purporting to come from third persons. See § 261. Again, the manager of a store operated by him for an undisclosed principal is enabled to cheat the customers because of his position. See § 222.

Restatement § 219, comment *e*. With the possible exception of the sections addressing physical harm, those provisions of the *Restatement* are not even superficially analogous to the issue presented in this case. And a close examination reveals that even the "physical harm" sections were intended to address a very different type of situation. For example:

> P, a taxicab company, purporting to be the master of the drivers of the cabs, in fact enters into an arrangement with the drivers by which the drivers operate independently. A driver negligently injures T, a passenger, and also B, a person upon the street. P is not liable to B. If it is found that T relied upon P as one furnishing safe drivers, P is subject to liability to T in an action of tort.

Restatement § 267, illus. 1. In short, the comments to *Restatement* § 219(2)(d) suggest that the provision applies only when the employee causes harm *because* of his position as an agent. *See* Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 Vand. L. Rev. 1229, 1249-50 (1991). Accordingly, it is simply inapplicable to the vast majority of hostile environment sexual harassment cases.

Likewise, *Restatement* concepts of "apparent authority" do not fit well into sexual harassment cases. The *Restatement* provides:

> [A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

Restatement § 27. The drafters' comments emphasize that "[f]or apparent authority there is the basic requirement that the principal be responsible for the information which comes to the mind of the third person." *Id.* § 27, comment *a*. "[E]ither the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* That test will almost never be satisfied if it is applied in the manner intended by the drafters of the *Restatement*, because, as discussed previously, everyone recognizes that "[s]exual harassment simply is not within the job description of any supervisor or any other worker in any reputable business." *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir. 1997), *petition for cert. filed*, No. 97-232 (quoting, *inter alia*, *Hicks v. Gates Rubber Co.*, 833 F.2d at 1417-18); *accord Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d at 261 ("illegal sexual harassment is an illegitimate corporate activity, beyond the scope of supervisors' employment"). The general public — including both employers and employees — is aware that sexual harassment is against the law. Thus, in most cases, an alleged victim's credibility would be seriously jeopardized if she testified that she believed her employer *intended* to give a supervisor authority to commit sexual harassment. *See Jansen*, 123 F.3d at 563 (Manion, J., concurring and dissenting). There is no doubt that the employer should be held responsible in a rare case where such an intent was proven, but there is no need to resort to the common law of agency to reach that result.

Instead, the employer in such a case should be held liable on the ground that it knew or should have known of the harassment but failed to take prompt remedial action.

As reflected by the conflict in the lower courts, the *Restatement*, depending on the section chosen and the interpretation given it, can support virtually any result on a particular set of facts. Petitioner's *amici*, in fact, provide a vivid example of this phenomenon. The Solicitor General states unequivocally that "an agent's knowledge that he is personally engaged in wrongdoing may not be imputed to the employer." (SG Br. 28 n.5, *citing Restatement* § 280.) At least two other *amici*, however, cite section 496 of the *Restatement* for the opposite proposition. (NELA Br. 18; Lawyers' Comm. Br. 26-27.) Thus, while the *Meritor* Court instructed that the courts should look to agency principles for "guidance" in this area, 477 U.S. at 72, if courts are allowed to pick and choose among various provisions of the *Restatement* for those agency principles, the "guidance" provided is, in reality, no guidance at all.

II. AN EMPLOYER'S LIABILITY FOR A SUPERVISOR'S HOSTILE ENVIRONMENT SEXUAL HARASSMENT SHOULD BE BASED ON COMMON LAW AGENCY PRINCIPLES APPLIED TO TRADITIONAL NEGLIGENCE

There is no dispute that a cause of action for sexual harassment is essentially a tort claim. In *Meritor*, the Court used the language of tort law in discussing whether an employer can be held "absolutely liable," or whether it can be held liable only if it "knew or should have known" of the harassment. 477 U.S. at 63. And again in *Harris*, in defining the scope of a cause of action for sexual harassment, the Court looked to the tort law concept of the "reasonable person." 510

U.S. at 21. The Court has also used tort-based doctrines in other contexts in interpreting Title VII. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 263 (1989) (O'Connor, J., concurring) ("where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the 'but-for' cause of the plaintiff's injury"). A number of lower courts have expressly recognized, moreover, that "Title VII . . . define[s] wrongs that are a type of tort, for which an employer may be liable." *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979); *accord Costle*, 561 F.2d at 995 (MacKinnon, J., concurring) ("sexual harassment . . . would constitute a tort"). Indeed, in practice, plaintiffs frequently bring pendent state law tort claims against employers and individual supervisors and co-workers in addition to Title VII sexual harassment claims — as petitioner did in this case. (Pet. App. 4a.)

Because the *Restatement* does not provide a workable solution to the employer liability question, the Court should look to the agency principles applicable in tort cases,[10] as

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[10] Although there is no general federal common law of torts, the Court frequently applies common law tort principles in particular areas of the law. For example, the Court recently reaffirmed that it has a "duty 'in interpreting [the Federal Employers' Liability Act] . . . to develop a federal common law of negligence . . . informed by reference to the evolving common law." *Metro-North Commuter R.R. v. Buckley*, 117 S. Ct. 2113, 2117 (1997) (quoting *Consolidated Rail Corp. v. Gottschall*, 512 U.S. 532, 558 (1994) (Souter, J., concurring)). Likewise, in admiralty cases, the Court regularly resorts to the common law of torts. *See, e.g., Saratoga Fishing Co. v. J.M. Martinac & Co.*, 117 S. Ct. 1783 (1997). *See also Heck v.*

informed by the objectives of Title VII. In particular, the Court should consider the objectives of Title VII specifically applicable to sexual harassment.

As originally enacted, Title VII was designed to eliminate discrimination in employment. *See* H.R. Rep. No. 914, 88th Cong., 2d Sess. 2401 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2401. In 1991, Congress revised Title VII "to strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination. H.R. Rep. No. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556. Thus, Congress had dual objectives for Title VII: effective deterrence and compensation for harm.

In sexual harassment cases, however, the emphasis should be on deterrence. Unlike many torts, hostile environment sexual harassment "does not usually bring about a significant change in the victim's wealth." *Jansen*, 123 F.3d at 510 (Posner, C.J., concurring and dissenting). Thus, even an award of damages in these cases is typically a mechanism for deterring future incidents of harassment, rather than a tool for compensating financial harm. Accordingly, the standard for employer liability in these cases should be one that focuses primarily on deterrence. As Chief Judge Posner noted in *Jansen*, "[t]here is no novelty in grounding principles of agency on deterrence." *Id.*

As discussed above, it is settled that employers are not to be held to a strict liability standard in all cases of supervisory harassment. *Meritor*, 477 U.S. at 72. Nor is such a standard

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Humphrey, 512 U.S. 477, 483 (1994) (applying the common law of torts in analyzing claims under 42 U.S.C. § 1983).

appropriate to deter sexual harassment by supervisors. In many cases, there is no reasonable measure that the employer could have taken to prevent the harassment. If the law nevertheless imposes liability in those cases:

> the *only* effect of the law will be to impose extra costs on employers and those with whom they are linked contractually. Employers will prefer paying the occasional judgment to incurring costs that, by definition, exceed the employer's foreseeable liability — by definition because, were the costs less than the expected liability, the failure to incur them would be negligence; it is only when they are greater, so that the employer would not be negligent for failing to incur them, that strict liability bites.

Jansen, 123 F.3d at 511 (Posner, C.J., concurring and dissenting) (emphasis in original). In short, "[s]ometimes the incremental contribution of strict liability to deterrence is nil or slight, and easily outweighed by the additional costs of a more expansive liability." *Id.*

As the Solicitor General points out, there is a consensus among the lower courts that an employer is liable for hostile environment harassment by a non-supervisory co-worker only if "the employer knew or should have known of the harassment and failed to take appropriate corrective action." (SG Br. 17) (citing cases).[11/] He contends, however, that a different

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[11/] The Solicitor General also notes that the lower courts have generally construed the Court's comments in *Meritor* to mandate a strict liability standard in all cases involving quid pro quo sexual harassment. (SG Br. 15-16 (citing

standard should apply to supervisors, i.e., that an employer may sometimes be absolutely liable for supervisory harassment, while an employer's liability for co-worker harassment turns solely on whether the employer is "negligent or reckless." (SG Br. 17.) Although the Solicitor General derives this standard (for co-worker harassment) from the *Restatement* — in particular, section 219(2)(b) — it is essentially a tort law standard. And it is this tort law standard that should also apply in determining employer liability for supervisory sexual harassment.

Negligence has been described as "conduct 'which falls below the standard established by law for the protection of others against unreasonable risk of harm.'" W. Page Keeton, *et al., Prosser and Keeton on the Law of Torts* § 31, at 169 (5th ed. 1984) (quoting *Restatement (Second) of Torts* § 282.) "[T]he essence of negligence is not necessarily the absence of solicitude for those who may be adversely affected by one's actions but is instead behavior which should be recognized as involving unreasonable danger to others." *Id.* "It thus is fundamental that the standard of conduct which is the basis of the law of negligence is usually determined upon a risk-benefit form of analysis: by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent

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cases)). Although the appropriate standard for imposing liability on an employer in a quid pro quo case is not at issue in this case, the Chamber believes that, by applying a strict liability standard in every such case, the lower courts have misinterpreted the Court's comments in *Meritor*. *See Jansen*, 123 F.3d at 519 (Coffey, J., concurring and dissenting) (strict liability standard is contrary to Court's decision in *Meritor* and at odds with the "agency principles" that the Court has instructed courts to consider in Title VII cases).

of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued." *Id.* at 173.

The Solicitor General's justification for adopting a different rule for supervisors is based on supervisors' purported "authority" under agency law. But that begs the question: authority to do what? Supervisors typically have authority to assign work to their subordinates, to evaluate their performance, and sometimes to hire and fire them. As discussed above, however, supervisors rarely have actual or apparent authority to sexually harass their subordinates. *See supra* at 13. To be sure, supervisors may have more opportunities to perpetrate sexual harassment, and in appropriate cases, it may be appropriate for the finder of fact to take that phenomenon into account in evaluating whether the employer was negligent in failing to prevent the harassment. However, the basic negligence standard of liability should be the same for all hostile environment sexual harassment. Regardless of whether the harasser is a supervisor or a co-worker, the employer should be held liable if and only if it knew or should have known of the harassment but failed to take prompt remedial action.

The approach advocated by the petitioner and the Solicitor General ignores the maxim that "[c]onventional rules of civil litigation generally apply in Title VII cases." *Price Waterhouse*, 490 U.S. at 253. "Strict liability or 'liability without fault' is the exception rather than the norm in Anglo-American tort law." *Jansen*, 123 F.3d at 521 (Coffey, J., concurring and dissenting) (emphasis omitted). Traditional tort law holds defendants to a negligence standard unless there is some extraordinary reason to impose strict liability. "Policy decisions of this magnitude have traditionally been left to the legislative branch of government, and should remain the

province of the people's elected representatives. In fact, Congress has not even *addressed* the issue of an employer's liability for sexual harassment, much less indicated that employers should be held strictly liable under a 'cost-shifting' theory." *Id.* at 522 (emphasis in original). *See also id.* at 518 ("A strict liability standard, in contrast with the more flexible and reasonable negligence standard, [would] preclude [courts] from accounting for 'the circumstances of [each] particular case,' including the disparate corporate structures of modern business.") (citation omitted).

Although courts will be required to evaluate on a case-by-case basis whether an employer has been negligent, a number of relevant concepts have already evolved in the lower courts. An employer is deemed to have knowledge of sexual harassment — and thus be liable for negligence if it fails to take action — if the victim complains to upper-level management. *See, e.g., Waltman v. International Paper Co.*, 875 F.2d 468, 478 (5th Cir. 1989). The employer may also be deemed to have knowledge if there have been previous complaints of harassment by the supervisor in question. *See, e.g., Bouton*, 29 F.3d at 107; *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir. 1989), *vacated and remanded on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc). And where the harassment is sufficiently severe and pervasive, the employer may be deemed to have constructive knowledge. *E.g., Meritor*, 477 U.S. at 72 (noting that the trial court had yet to determine whether the supervisor's harassment was so pervasive and continuous that the employer must have become conscious of it); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989).

An employer with actual or constructive knowledge can nevertheless avoid liability for negligence if it takes prompt corrective action. *See, e.g., Dennis v. County of Farifax*, 55 F.3d 151, 155 (4th Cir. 1995). At a minimum, the employer

must investigate the complaint, *e.g., Carmon v. Lubrizol Corp.*, 17 F.3d 791, 794-95 (5th Cir. 1994), and if it finds that the complaint is meritorious, should mete out discipline to the supervisor that is commensurate with the severity of the misconduct. *See, e.g., Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991).

Finally, the Court's decision in *Meritor* instructs that it is important for an employer to adopt an antiharassment policy. In that case, the Court rejected an argument that "the mere existence of a grievance procedure and a policy against discrimination, coupled with [an employee's] failure to invoke that procedure, must insulate [the employer] from liability." 477 U.S. at 72. But in *Meritor*, the employer's "general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination. Moreover, the [employer's] grievance procedure apparently required an employee to complain first to her supervisor . . . ." *Id.* at 72-73 (citation omitted). "Since [the plaintiff's supervisor] was the alleged perpetrator, it [was] not altogether surprising that [the plaintiff] failed to invoke the procedure and report her grievance to him." *Id.* at 73. The Court emphasized that the employer's "contention that [the employee's] failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." *Id.*

In the instant case, the City had adopted a written policy expressly prohibiting sexual harassment in the workplace. (JA 269-272.) The policy provided that "[a]ny employee who believes he or she has been the subject of sexual harassment should report the alleged act immediately to his or her department supervisor, department or division head or the Personnel & Labor Relations Director." (JA 271.) Indeed, the

policy further provided that complaints against supervisors should be "filed directly with the Personnel & Labor relations director or representative." (*Id.*) Furthermore, the policy required a prompt, confidential investigation, and stated that if a violation is found, "prompt attention and disciplinary action designed to stop the harassment immediately and to prevent its recurrence will be taken." (*Id.*)

Petitioner worked for the City from September 1985 through June 1990, but she never filed a complaint with the personnel department. (Pet. App. 2a-3a.)[12/] In April 1990, another former lifeguard wrote a letter to the personnel department complaining that Bill Terry and David Silverman had sexually harassed the female lifeguards. (Pet. App. 4a.) The City promptly investigated the complaint, determined it to be valid, and disciplined both men. (*Id.*) Under these circumstances, petitioner did not establish that the City was negligent, i.e., that it "knew or should have known" of the harassment prior to April 1990.[13/]

[12/] Petitioner did complain to another supervisory lifeguard. However, that supervisor was an immediate subordinate of one of the men who was harassing petitioner. (Pet. App. 3a.) Thus, as one might expect, this course of action was just as futile as complaining to one of the perpetrators themselves. By contrast, the City's procedures — which petitioner did not invoke — were designed to encourage sexual harassment victims to lodge complaints with persons who could and would redress their grievances.

[13/] Although there was "some evidence that the City did not effectively disseminate" its sexual harassment policy to its lifeguard staff, (Pet. App. 17a n.11), the court of appeals concluded that the "failure to disseminate this policy was not

Most responsible American employers have heeded *Meritor*'s admonition, and have adopted strong policies against sexual harassment. Such policies dispel any notion that supervisors or other co-workers have either "actual authority" or "apparent authority" to commit sexual harassment. Likewise, such policies provide a mechanism for employers to learn that sexual harassment is taking place, so that they may take appropriate remedial action. "[W]ith rights should come responsibilities, including . . . the responsibility [to use] the procedures spelled out in the company's published policy against sexual harassment." *Jansen*, 123 F.3d at 547 (Coffey, J., concurring and dissenting). *See also Gary*, 59 F.3d at 1398 ("when . . . an employer has taken energetic measures to discourage sexual harassment in the workplace and has established, advertised, and enforced effective procedures to deal with it when it does occur, it must be absolved of Title VII liability under a hostile work environment theory of sexual harassment").

Contrary to the theme that permeates the briefs of petitioner and her *amici*, the vast majority of America's employers do not condone or tolerate sexual harassment, nor do they retaliate against employees who complain about this pernicious problem. Most employers, in fact, are dedicated to preventing sexual harassment, because doing so is both morally and financially responsible. Doing otherwise would not only subject them to liability, it would make it far more difficult to hire and retain good employees.

The Court should adopt a rule of law that imposes liability only on employers who fail to exercise due care in

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the reason why the City did not know about the harassment." (*Id.*)

adopting and implementing policies reasonably designed to eradicate sexual harassment from the workplace. "If the law imposes liability in harassment cases in which there is no reasonable measure that the employer could have taken to prevent the harassment, the *only* effect of the law will be to impose extra costs," with no corresponding benefits. *Jansen*, 123 F.3d at 511 (Posner, C.J., concurring and dissenting) (emphasis in original).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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No. 97-282

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BETH ANN FARAGHER,
Petitioner,
v.
THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF THE RESPONDENT

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BRIEF AMICUS CURIAE OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF THE RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

The Society for Human Resource Management (SHRM) is the leading voice of the human resource profession. SHRM, which celebrates its 50th anniversary in 1998, provides education and information services, conferences and seminars, government and media representation, on-

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No persons or entities other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

line services and publications to more than 90,000 professional and student members throughout the world. As the world's largest human resource management association, SHRM is a founding member of the North American Human Resource Management Association and a founding member and Secretariat of the World Federation of Personnel Management Associations.

As the major association of the human resources profession, SHRM and its members are vitally concerned with the orderly development of the law defining, in practical terms, the meaning of non-discrimination and equal employment opportunity and, more specifically, the nature and scope of an employer's obligation to provide a workplace free from sexual harassment. SHRM has long recognized its special responsibility to support and encourage compliance with fundamental principles of equal employment opportunity in the administration of efficient, workable personnel management systems.

With respect to this case, SHRM's interest is to protect its members by supporting rules that encourage employers to initiate and maintain, and employees to use, procedures that address sexual harassment complaints. SHRM offers its members written guidance, such as advisory papers entitled "Minimizing Workplace Sexual Harassment: A Preventative Strategy" and "Resolving Sexual Harassment Disputes Through Mediation" and white papers on landmark court decisions that address sexual harassment. SHRM also provides training to its members in annual conferences. At the 1997 conference, a presentation was made to SHRM members entitled "Proactive Measures in Sexual Harassment and Discrimination for the Litigation-Averse". These measures are designed by SHRM to teach and motivate employers to develop anti-harassment policies and procedures that will encourage employees to report harassment in the workplace.

Conversely, the rules that Petitioner suggests that the Court adopt in this case would encourage employees to bypass internally established mechanisms and prematurely seek judicial redress for most acts of alleged harassment by supervisors. Therefore, SHRM submits this brief to further its goal of promoting management policies that foster the efficient internal resolution of employment disputes.

INTRODUCTION

In its landmark decision in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986), this Court noted that employers can substantially reduce the likelihood of incurring liability for sexual harassment by establishing procedures "calculated to encourage victims of harassment to come forward." Four years later, the United States Equal Employment Opportunity Commission (EEOC) explained that, to accomplish this end, employers should establish an explicit and regularly communicated policy that prohibits harassment, sets forth sanctions for harassment, establishes procedures to address harassment complaints and ensures that complaints will be addressed confidentially to the extent practical and with protection from retaliation.[2]

This advice has not gone unheeded by corporate America. In fact, recent surveys have revealed that an overwhelming majority of employers have promulgated formal policies addressing the issue of sexual harassment in the workplace.[3] Also, consistent with the language in

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[2] EEOC Compliance Manual (CCH) ¶ 3114, at 3282 (Mar. 19, 1990). (To facilitate the Court's complete understanding of the terms of an anti-harassment policy, a sample is attached as an Appendix.)

[3] Sherwood Ross, *Closing the Door on Harassment*, Newsday, July 13, 1997, at F10 (A study by the American Management Association found that 89 percent of its member companies have formal "no harassment" policies.); Lynne Curry-Swann, *Do I Need A Priest, A Lawyer, Or What?*, Anchorage Daily News, Feb. 19, 1996, at D1

Meritor and with SHRM's encouragement, many employers have found that their policies serve the dual purpose of deterring sexual harassment in the work environment and providing legal protection from claims raised by employees who seek judicial relief before giving the employer's internal grievance system a chance to work.[4]

Here, Petitioner proposes a number of rules that would allow employees to bypass internal grievance procedures and nonetheless recover damages. These rules would thereby greatly reduce, if not altogether eliminate, the protection afforded to employers who disseminate and enforce strong anti-harassment policies. At the same time, these rules—by eliminating the duty to exhaust internal procedures—would increase the already over-crowded court docket of employment cases.[5]

Despite the fact that SHRM and the Petitioner share a common goal—to eradicate sexual harassment in the

(Over 70 percent of 300 personnel executives nationwide confirmed that their companies have policies encouraging employees to report issues such as sexual harassment.); Michele Himmelberg, *Sexual Harassment: Has Anything Changed?*, S.F. Examiner, Oct. 15, 1995, at J15 ("Nearly 75 percent of U.S. companies with more than 100 employees had formal policies on sexual harassment in 1994."); Excerpts of EEOC Task Force Report on 'Best' EEO Policies, Programs, Practices in Private Sector, 246 Daily Lab. Rep. (BNA) E-9 (Dec. 23, 1997) (The EEOC has also recently recognized a number of companies for their exemplary compliance efforts, including the establishment of strong anti-harassment policies.).

[4] A June 1994 survey by SHRM, entitled "How Prevalent is Sexual Harassment?", revealed that 96.6% of its members work in organizations that have written policies defining and prohibiting sexual harassment and establishing the manner in which complaints are handled.

[5] Of the civil cases commenced in federal district court in 1997, more employment matters were brought than any other single specifically identified category of cases, comprising almost 9% of the 1997 docket. Administrative Office of the United States Courts, Statistics Division, Judicial Business of the United States Courts, 1997 Report of the Director (unpublished), Table C-2A.

workplace—SHRM firmly believes that employers, rather than courts, are best suited in the first instance to address this issue in an efficient and definitive manner.[6] The courts have echoed this sentiment. For example, the Eleventh Circuit cautioned in *Elrod v. Sears, Roebuck and Co.*, federal courts "do not sit as a super-personnel department that reexamines an entity's business decicions."[7] Similarly, the First Circuit noted in *Keyes v. Secretary of the Navy*, "It is chancy business, indeed, for a court—on so interstitial a matter—to set itself up as a super personnel evaluator . . . ."[8]

Beyond this, the courts have also recognized that internal complaint procedures are to be applauded and warrant the legal protection they offer employers who use them effectively. For example, in *Carmon v. Lubrizol Corp.*,[9] the employer "took the allegations seriously, it conducted prompt and thorough investigations, and it immediately implemented remedial and disciplinary measures based on the results of such investigations. Holding a company such as [this] liable after it has taken such action would produce truly perverse incentives benefitting no one, lease of all actual or potential victims of sexual harassment." Similarly, in *Sims v. Brown & Root Indus. Servs., Inc.*,[10] the court reasoned: "Moreover, it is apparent that [the employer's] sexual harassment policy, which provides a clear avenue for all abused employees by way

[6] The statistical effectiveness of internal complaint procedures was established by the same SHRM survey, *supra*, at n.4. Of the sexual harassment complaints that were reported to the human resources departments, only 22.6% of the respondents reported that those complaints subsequently resulted in a charge being filed with a government agency or court.

[7] 939 F.2d 1466, 1470 (11th Cir. 1991) (citation omitted).

[8] 853 F.2d 1016, 1024-25 (1st Cir. 1988).

[9] 17 F.3d 791, 795-96 (5th Cir. 1994).

[10] 889 F. Supp. 920, 929 (W.D. La. 1995), *aff'd*, 78 F.3d 581 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 68 (1996).

of its Open Door Complaint Policy and hotline telephone number, actually worked in this case and should therefore be praised and celebrated as a model of efficiency."

As previously described, SHRM encourages all its members to adopt and strictly enforce strong policies prohibiting sexual harassment in the workplace and to provide avenues of relief for victims of harassment. For these policies to work, however, participation by employers and employees alike is required. If Petitioner's rules are adopted and thereby send the message to employees that they need not report harassment when avenues are available but may instead seek judicial relief in the first instance, these policies will be ineffective. Moreover, if these policies provide little or no protection from liability to employers, one must ask: Will employers be less inclined to heed the encouragement of SHRM professionals on their staff to adopt and maintain them?

In this brief, SHRM will demonstrate that Petitioner's proposed rules are inconsistent with the well-reasoned decisions of numerous circuit courts and the goal of eradicating sexual harassment through the cooperation of employers and employees, rather than through premature judicial intervention.

SUMMARY OF ARGUMENT

To make it easier to sue, Petitioner proposes three rules that encourage employees to bypass the internal complaint procedures contained in anti-harassment polices. The first is a rule that would effectively impose liability on employers in virtually all situations in which a hostile work environment is created by a supervisor's conduct. Petitioner contends that this rule is reasonable because there is always an implicit threat of retaliation if the employee complains about a supervisor; and, therefore, the harassment is aided by the supervisor's authority. This reasoning, however, ignores the fact that an employer can expressly eliminate any meaningful threat of

retaliation by publishing policies that state that supervisors do not have the power to harass or retaliate against employees and will be terminated for that misconduct.

Second, Petitioner proposes a rule requiring courts to find that an employer has knowledge of harassment if any supervisor receives a complaint. Again, this rule would encourage employees to ignore the internal complaint procedures established by employers because these procedures often designate trained and experienced specific individuals to receive these complaints.

Finally, Petitioner proposes a rule that would require courts to find that an employer has constructive knowledge of any conduct sufficiently pervasive to create an abusive work environment. This proposed rule ignores the fact that even pervasive harassment can go unobserved if it takes place in a remote location, during off-hours or at times when no upper management is present. If employees who work in that environment are not required to make an internal complaint before beginning a lawsuit, who should?

Therefore, SHRM requests that the Court reject each of the three rules proposed by Petitioner and adopt rules that encourage employees to take advantage of the existing avenues of relief provided by employers before seeking judicial relief.

ARGUMENT

POINT I

Employer Liability for a Hostile Work Environment Created by a Supervisor Is Improper if the Supervisor's Conduct Is Expressly Prohibited by a Well-Published Anti-Harassment Policy and the Employer Had No Notice of, or Adequately Responded to, the Supervisor's Conduct.

The first question presented in this case is: Does the threat of retaliation require that an employer be held liable for a hostile work environment created by a super-

visor's conduct—despite the employer's lack of actual or constructive knowledge of the conduct? The starting point for answering this question is this Court's decision in *Meritor, supra,* which rejected a strict liability standard and held that employers are not "always automatically liable for sexual harassment by their supervisors." [11] Instead, courts are to look to agency principles, and determine whether the supervisor was aided in accomplishing the harassment by the existence of the agency relationship.[12]

Petitioner asserts that this determination should be made through the viewpoint of the victim, and suggests that harassment must be deemed to be aided by a supervisor's authority if "the victim reasonably believes that she is at risk of retaliation if she resists, objects to or complains about that harassment." [13] This proposed standard, of course, raises an additional question: When is a victim's purported subjective fear of retaliation objectively reasonable? According to Petitioner this fear is always reasonable because a supervisor's "[o]ngoing control over the subordinate's activities and prospects is a daily reminder of the risks that would be incurred by any objection." [14]

Petitioner suggests that an exception to this principle would arise if the subordinate "knew with certainty that the subordinate had available to her the means to thwart any adverse actions which the supervisor might seek to take." [15] Petitioner's only example of a circumstance fitting this exception is "the happy position of enjoying the immunity from supervisory abuse that is a prerequisite

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[11] *Meritor,* 477 U.S. at 72.

[12] *Id.*; *See generally* Restatement (Second) of Agency § 219-237 (1958).

[13] Petitioner's Br. 21.

[14] Petitioner's Br. 25.

[15] Petitioner's Br. 28.

[sic] of being the boss' daughter." [16] As this circumstance is too rare to be meaningful, Petitioner's viewpoint can be described as a virtually unmitigated belief that a victim's fear of adverse consequences from reporting supervisory harassment is always reasonable.

If Petitioner's reasoning were adopted, employees who bypass internal grievance procedures in favor of seeking judicial relief would be deemed justified, and would be entitled to recover damages, in virtually all instances in which a supervisor engages in sexual harassment. Thus, while Petitioner's path to a strict liability standard is circuitous rather than direct, she nonetheless proposes a strict liability standard for supervisory harassment. This analysis runs afoul of the decision in *Meritor* and, therefore, must be rejected.

A better approach is illustrated in recent court decisions that have focused on the employer's actions, rather than the victim's alleged perception, to determine whether a supervisor has harassed an employee with the aid of his supervisory authority. For example, in *Perry v. Harris Chernin, Inc.*, the employer, a chain of shoe stores, went to great lengths to communicate to its employees that harassment would not be tolerated in the workplace.[17] As SHRM endorses, these efforts included publishing policies prohibiting sexual harassment in the employee handbook, distributing a pamphlet elaborating on the policy, instructing employees to report any unwelcome harassment to one of four corporate officers and addressing harassment in three meetings, including one specifically convened to discuss the issue.[18]

Despite these measures, the plaintiff, a cashier, who alleged in her lawsuit that she was subjected to harassment on a daily basis by the store manager, did not com-

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[16] Petitioner's Br. 29.

[17] 126 F.3d 1010, 1012 (7th Cir. 1997).

[18] *Id.*

plain to the employer until after she quit her job.[19] That complaint prompted an investigation and an invitation to the plaintiff to work at another store during the investigation.[20] The plaintiff declined the invitation and refused to cooperate with the investigation.[21] Instead, she filed suit claiming sexual harassment and constructive discharge.[22]

Pursuant to Petitioner's proposed approach, the plaintiff's failure to complain and refusal to cooperate with the investigation would be justified by her fear and belief that the supervisor's conduct carried an implicit threat of reprisal if she objected. Thus, under a strict liability standard, the employer's exemplary efforts to eradicate harassment in the workplace would not provide it with any legal protection.

The manner in which the Seventh Circuit addressed these facts is more reasonable. Ruling in favor of the employer, the court held that, in these circumstances, imposing an obligation on the employee to complain before seeking damages was not unreasonable.[23] While the harasser did possess supervisory authority over the plaintiff, the employer's policy made it clear that "[i]n the scheme of things, he was a co-worker who was directly answerable to the same people [plaintiff] should have told." [24]

Similarly, in *Torres v. Pisano*,[25] the employer, New York University, promulgated a written sexual harassment

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[19] *Id.* at 1011-12.

[20] *Id.* at 1012.

[21] *Id.*

[22] *Id.* at 1013.

[23] *Id.* at 1014-15.

[24] *Id.* at 1014.

[25] 116 F.3d 625, 628, 636 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 563 (1997).

policy and grievance procedure that was known to the plaintiff, an administrative secretary. Nonetheless, because of her fear of her immediate supervisor, the plaintiff initially chose not to complain.[26] When she finally broke her silence, however, her complaint was investigated, she was offered a transfer to another department and the supervisor was ultimately terminated for his conduct.[27] Despite this response, the plaintiff elected to bring suit against her employer.[28]

Again, under Petitioner's proposed rule of strict liability, the plaintiff's purported fear that her supervisor would retaliate if she reported his conduct would constitute proof that he acted with the aid of supervisory authority. Thus, New York University would be liable despite its policy and its response to plaintiff's complaint.

The court in *Torres* expressly rejected this reasoning, recognizing that it would result in strict liability, and noted that:

> [T]he supervisor is always aided by the employment relationship because the employee will fear the repercussions that might result from her complaining or resisting. But this exception too, if applied in the absence of specific evidence that the supervisor used his authority to place the employee in a position in which she felt that she could not complain without facing adverse consequences, would swallow the rule and negate our holding [rejecting strict liability in supervisor harassment cases].[29]

The "specific evidence" referenced by the Second Circuit is proof that the supervisor expressly invoked his super-

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[26] *Id.* at 628.

[27] *Id.* at 629.

[28] *Id.*

[29] *Id.* at 635.

visory authority when perpetrating the harassment.[30] Absent this evidence, where a low-level supervisor engages in conduct contrary to a written policy that prohibits harassment and provides a procedure to report unwelcome conduct, the employer will not be liable unless it failed to respond adequately after receiving notice of the conduct.[31]

The holdings in *Perry* and *Torres*, as well as the Eleventh Circuit's ruling below,[32] are not only consistent with agency principles, but they also provide employers with an incentive to adopt and enforce strong anti-harassment policies. These cases are also illustrative of common fact patterns and other court decisions.[33] The approach taken by the employers in these cases is endorsed in SHRM's literature and training programs. By contrast, the analysis proposed by Petitioner would have the opposite effect. If employers are subjected to liability despite their efforts to prevent and punish sexual harassment, they could become less motivated to adopt the policies and practices espoused by their human resource professionals and to devote time and financial resources to address this issue. SHRM respectfully asks: Is that what this Court really wants to do? Accordingly, the Petitioner's strict liability analysis should be rejected.

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[30] *Id.*

[31] *Id.* at 634-38.

[32] *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 438 (1997).

[33] *See, e.g., Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 153 (2d Cir. 1997) (prompt and appropriate action in response to harassment complaint barred liability); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 110 (3d Cir. 1994), *reh'g denied*, (Aug. 3, 1994) (employer not liable for supervisor harassment where, in response to complaint, employer took effective action to halt alleged harassment); *Perkins v. General Motors Corp.*, 709 F. Supp. 1487, 1488-98 (W.D. Mo. 1989), *aff'd*, 911 F.2d 22, 27 (8th Cir. 1990), *reh'g denied*, (Aug. 29, 1990, Aug. 31, 1990), *cert. denied*, 499 U.S. 920 (1991) (no liability where, in response to complaint, employer took appropriate corrective action and the harassment ceased immediately).

POINT II

Supervisors Are Not Automatically Agents of the Employer for the Purpose of Receiving and Responding to Harassment Complaints; Complaints to Low-Level Supervisors Not Designated As Agents for This Purpose in an Anti-Harassment Policy Are Insufficient to Charge the Employer With Actual Knowledge of a Hostile Work Environment.

Next, Petitioner's Brief raises the question: When should an employer be charged with actual knowledge of a hostile work environment? In its response, Petitioner urges the Court to adopt a rule that would charge an employer with knowledge if any supervisor is made aware of the hostile environment and has a duty to disclose the information to the employer.[34]

Again, Petitioner proposes a rule that ignores the significance of employer adopted anti-harassment policies, which are encouraged and endorsed by SHRM. Often, employers disseminate policies that designate specific members of management as their agents to receive and act on harassment complaints. In doing so, employers communicate to their employees that they have placed the duty to address workplace harassment in the hands of individuals, rather than the entire supervisory staff. Frequently, these individuals are SHRM members or have been trained by SHRM members regarding topics such as how to recognize sexual harassment, complaint intake procedures, confidentiality protection and effective listening techniques. Non-designated supervisors possess neither actual nor apparent authority to address harassment complaints on the employer's behalf.[35] Nor are they trained to do so.

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[34] Petitioner's Br. 31.

[35] SHRM does not suggest that employers should refrain from training all supervisors to be sensitive to the issue of workplace harassment. Rather, the issue here is whether an employee should be permitted to charge an employer with knowledge of harassment

This point was illustrated in *Baskerville v. Culligan Int'l Co.*[36] There, the employer disseminated an anti-harassment policy that instructed employees to submit complaints to the human resources department.[37] The plaintiff, who admitted that she knew about this policy, nonetheless made her initial harassment complaint to someone outside that department.[38] Several months later, when that supervisor failed to stop the harassment, the plaintiff contacted the human resources department.[39] Thereupon, immediate action was taken and the harassment ceased.[40]

The court found that the employer could not be held liable for its supervisor's failure to correct the alleged harassment because the employee had not followed the proper channels for complaining.[41] In so ruling, the court correctly surmised that: "[h]ad [the plaintiff] complained to the human resources department earlier, as she had been instructed to do, there is no reason to doubt that the 'harassment' . . . would have ceased then."[42]

Particularly in large companies, creating a "chain of communication" for reporting acts of harassment is gen-

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if she complains to a person known to be outside the "chain of communication" created by a well-published anti-harassment policy.

[36] 50 F.3d 428 (7th Cir. 1995).

[37] *Id.* at 432.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*; The same result was reached in *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996), *reh'g denied*, 105 F.3d 673 (11th Cir. 1997). There, the court found that a complaint to an individual who was not a member of "higher management" or a person designated to receive complaints pursuant to the company's anti-harassment policy, did not constitute notice to the company.

[42] Baskerville, 50 F.3d at 432.

erally necessary for an employer to enforce its anti-harassment policy consistently. Moreover, by clearly assigning the responsibility to investigate and redress harassment in the workplace, employers can offer greater confidentiality to employees who submit complaints. It also lessens the likelihood of retaliation when complaints are made in accordance with established procedures that also provide that retaliation is against the law and company policy. (See discussion regarding retaliation, *supra*, at pp. 7-12.)

In retrospect, Petitioner's rule would change the holding of the Seventh Circuit in *Baskerville* (*supra*, at p. 14) and the Eleventh Circuit in *Kilgore* (*supra*, at n.41). It would encourage employees to disregard the procedures contained in anti-harassment policies, often to their own detriment. Therefore, the rule proposed by the Petitioner should not be adopted.

POINT III

Employers Should Not Be Automatically Charged with Constructive Knowledge of Harassment Deemed to Be Sufficiently Pervasive to Create an Abusive Work Environment.

Finally, Petitioner proposes that this Court find that if harassment is sufficiently pervasive to create an abusive work environment, the employer should automatically be charged with constructive notice.[43] Stated another way, Petitioner contends that if employers are not aware that pervasive harassment is taking place, they should be deemed negligent and charged with knowledge.

In reality, however, even pervasive harassment can go undetected. For example, in *Pfau v. Reed*,[44] the plaintiff presented sufficient facts to support a claim that she was

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[43] Petitioner's Br. 34-35.

[44] 125 F.3d 927, 939 (5th Cir. 1997).

subjected to conduct that created an abusive work environment. This evidence notwithstanding, the court found that the harassment was not so open and obvious to support a finding that the employer should have known it was taking place.[45] In so ruling, the court noted:

> This conclusion is bolstered by the fact that much of the alleged conduct took place outside the working environment and the affidavits offered by [the plaintiff] contain little indication that any substantial portion of the alleged sexual harassment took place in the presence of other employees.[46]

Similarly, in *E.E.O.C. v. Domino's Pizza, Inc.*,[47] the plaintiff was subjected to continual acts of harassment by his supervisor during a five month period. The court found that this conduct was sufficiently pervasive to create a hostile environment, but nevertheless declined to charge the employer with constructive knowledge, noting that "no one from [employer's] management was there to observe [the supervisor's] conduct." [48]

Likewise, in *Kotcher v. Rosa and Sullivan Appliance Ctr., Inc.*,[49] the plaintiffs alleged that, over a period of several months, they were subjected to unwelcome conduct by the store manager, the highest ranked supervisor at a remote location in Oswego, New York. Though the district court concluded that the alleged harassment was sufficiently pervasive to subject the plaintiffs to a hostile work environment, it declined to impose liability on the company for the store manager's conduct prior to the date on which the plaintiffs submitted their complaints pursuant

[45] *Id.*

[46] *Id.*

[47] 909 F. Supp. 1529, 1533 (M.D. Fla. 1995), *aff'd*, 113 F.3d 1249 (11th Cir. 1997), *cert. denied*, 1998 WL 6440 (1998).

[48] *Id.* at 1535.

[49] 957 F.2d 59, 61 (2d Cir. 1992).

to the company's grievance procedure.[50] The Second Circuit agreed, and held that "the district court could reasonably have found that the company, whose main office was in Rochester, did not have constructive notice of [the store manager's] behavior in Oswego." [51]

SHRM does not suggest that the pervasiveness of harassment is irrelevant to the determination of whether an employer should be charged with constructive knowledge. Rather, as the Eleventh Circuit recognized below, pervasiveness is one of many facts that should be considered in making this determination.[52] The other facts that the court found determinative included the location and time of the harassment, the employer's opportunity to observe the conduct and form of the harassment.[53]

If, instead, knowledge of pervasive harassment is automatically charged to employers, employees will have little incentive to report this conduct. Under Petitioner's rule, when an employee is faced with pervasive harassment in the workplace, that employee could go straight to court and seek a remedy, rather than allowing the employer's internal grievance procedure to work. This result must be avoided; and rules should be adopted that, instead, encourage employees to come forward and give the employer an opportunity to provide a remedy.

[50] *Id.* at 61-62.

[51] *Id.* at 64.

[52] *Faragher*, 111 F.3d at 1538.

[53] *Id.* at 1538-39.

CONCLUSION

For all the foregoing reasons, SHRM respectfully requests that this Court affirm the Eleventh Circuit's *en banc* ruling and support rules that encourage both employers and employees to establish and utilize internal policies against harassment.

Respectfully submitted,

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APPENDIX

APPENDIX

SAMPLE POLICY STATEMENT CONCERNING NON-DISCRIMINATION AND HARASSMENT

The XYZ Company is committed to a work environment in which all individuals are treated with respect and dignity. Each individual has the right to work in a professional atmosphere that promotes equal employment opportunities and prohibits discriminatory practices, including harassment. Therefore, XYZ expects that all relationships among persons in the office will be business-like and free of bias, prejudice and harassment.

Equal Employment Opportunity

It is the policy of XYZ to ensure equal employment opportunity without discrimination or harassment on the basis of race, color, religion, sex, sexual orientation, age, disability, marital status, citizenship or any other characteristic protected by law. XYZ prohibits any such discrimination or harassment.

Retaliation Is Also Prohibited

XYZ encourages reporting of all perceived incidents of discrimination or harassment. It is the policy of XYZ to investigate such reports. XYZ prohibits retaliation against any individual who reports discrimination or harassment or participates in an investigation of such reports.

Definitions of Harassment

i. *Sexual harassment* constitutes discrimination and is illegal under federal, state and local laws. For the purposes of this policy, sexual harassment is defined, as in the Equal Employment Opportunity Commission Guidelines, as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when, for example: (1) submission to such conduct is made either explicitly

or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Sexual harassment may include a range of subtle and not so subtle behaviors and may involve individuals of the same or different gender. Depending on the circumstances, these behaviors may include, but are not limited to: unwanted sexual advances or requests for sexual favors; sexual jokes and innuendo; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess or sexual deficiencies; leering, whistling or touching; insulting or obscene comments or gestures; display in the workplace of sexually suggestive objects or pictures; and other physical, verbal or visual conduct of a sexual nature.

ii. *Harassment on the basis of any other protected characteristic* is also strictly prohibited. Under this policy, harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, sex, sexual orientation, national origin, age, disability, marital status, citizenship or any other characteristic protected by law or that of his/her relatives, friends or associates, and that: (i) has the purpose or effect of creating an intimidating, hostile or offensive work environment; (ii) has the purpose or effect of unreasonably interfering with an individual's work performance; or (iii) otherwise adversely affects an individual's employment opportunities.

Harassing conduct includes, but is not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; denigrating jokes; and written

or graphic material that denigrates or shows hostility or aversion toward an individual or group and that is placed on walls or elsewhere on the employer's premises or circulated in the workplace.

Individuals and Conduct Covered

These policies apply to all applicants and employees, whether related to conduct engaged in by fellow employees or someone not directly connected to XYZ (*e.g.*, an outside vendor, consultant or customer).

Conduct prohibited by these policies is unacceptable in the workplace and in any work-related setting outside the workplace, such as during business trips, business meetings and business-related social events.

Reporting an Incident of Harassment, Discrimination or Retaliation

XYZ encourages reporting of all perceived incidents of discrimination, harassment or retaliation, regardless of the offender's identity or position. Individuals who believe that they have been the victim of such conduct should discuss their concerns with their immediate supervisor, any member of the Personnel Practices Committee, the Director of Human Resources or any ombudsman. See the Complaint Procedure described below.

In addition, XYZ encourages individuals who believe they are being subjected to such conduct promptly to advise the offender that his or her behavior is unwelcome and request that it be discontinued. Often this action alone will resolve the problem. XYZ recognizes, however, that an individual may prefer to pursue the matter through informal or formal complaint procedures.

Complaint Procedure

Informal Procedure

If for any reason an individual does not wish to address the offender directly, or if such action does not successfully end the offensive conduct, the individual should notify his/her immediate supervisor, the Director of Human Resources, a member of XYZ's Personnel Practices Committee or any ombudsman, who may, if the individual so requests, talk to the alleged offender on the individual's behalf. In addition, there may be instances in which an individual seeks only to discuss matters with one of the XYZ designated representatives, and such discussion is encouraged.

An individual reporting harassment, discrimination or retaliation should be aware, however, that XYZ may decide it is necessary to take action to address such conduct beyond an informal discussion. This decision will be discussed with the individual. The best course of action in any case will depend on many factors and, therefore, the informal procedure will remain flexible. Moreover, the informal procedure is not a required first step for the reporting individual.

Formal Procedure

As noted above, individuals who believe they have been the victims of conduct prohibited by this policy statement or believe they have witnessed such conduct should discuss their concerns with the Director of Human Resources, any member of the Personnel Practices Committee or any ombudsman.

XYZ encourages the prompt reporting of complaints or concerns so that rapid and constructive action can be taken before relationships become irreparably strained. Therefore, while no fixed reporting period has been established, early reporting and intervention have proven to be the most effective method of resolving actual or perceived incidents of harassment.

Any reported allegations of harassment, discrimination or retaliation will be investigated promptly. The investigation may include individual interviews with the parties involved and, where necessary, with individuals who may have observed the alleged conduct or may have other relevant knowledge.

Confidentiality will be maintained throughout the investigatory process to the extent consistent with adequate investigation and appropriate corrective action.

Retaliation against an individual for reporting harassment or discrimination or for participating in an investigation of a claim of harassment or discrimination is a serious violation of this policy and, like harassment or discrimination itself, will be subject to disciplinary action. Acts of retaliation should be reported immediately and will be promptly investigated and addressed.

Misconduct constituting harassment, discrimination or retaliation will be dealt with appropriately. Responsive action may include, for example, training, referral to counseling and/or disciplinary action such as warning, reprimand, withholding of a promotion or pay increase, reassignment, temporary suspension without pay or termination, as XYZ believes appropriate under the circumstances.

If a party to a complaint does not agree with its resolution, that party may appeal to XYZ's Executive Director or the Chief Operating Officer.

False and malicious complaints of harassment, discrimination or retaliation as opposed to complaints which, even if erroneous, are made in good faith, may be the subject of appropriate disciplinary action.

Conclusion

XYZ has developed this policy to ensure that all its employees can work in an environment free from harassment, discrimination and retaliation. XYZ will make

every reasonable effort to ensure that all concerned are familiar with these policies and aware that any complaint in violation of such policies will be investigated and resolved appropriately.

Any employee who has any questions or concerns about these policies should talk with the Director of Human Resources or a member of the Personnel Practices Committee.

Finally, these policies should not, and may not, be used as a basis for excluding or separating individuals of a particular gender, or any other protected characteristic, from participating in business or work-related social activities or discussions. In other words, no one should make the mistake of engaging in discrimination or exclusion in order to avoid allegations of harassment. The law and the policies of XYZ prohibit disparate treatment on the basis of sex or any other protected characteristic, with regard to terms, conditions, privileges and perquisites of employment. The prohibitions against harassment, discrimination and retaliation are intended to complement and further those policies, not to form the basis of an exception to them.

Supreme Court, U.S.
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No. 97-282

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1997

BETH ANN FARAGHER,

Petitioner,

v.

THE CITY OF BOCA RATON,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amicus the National Association of Manufacturers ("the NAM") is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including approximately 10,000 small manufacturers, are located in every state and produce roughly 85 percent of U.S. manufactured goods. The NAM, through its member companies and affiliated associations, represents 185,000 businesses which employ more than 18 million individuals in every industrial sector.

Manufacturers Alliance for Productivity and Innovation, Inc. (the "Alliance") is a nonprofit research organization supported by some 450 manufacturing companies from a broad range of industries, including the leading companies in machinery and components, primary metals, automotive, pharmaceuticals, chemicals, oil and gas, electronics, precision instruments, telecommunications, computers, office systems, aerospace, and similar high-technology industries. Approximately one-quarter of the Fortune 500 industrial companies are members of the Alliance. A substantial proportion of Alliance members have sizable workforces of at least 5,000 employees and annual payrolls in excess of $100 million. The Alliance maintains two standing Human Resources Councils comprised of many member companies' senior human resources executives. A primary purpose of those Councils is to apprise

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[1] No counsel for any party had any role in authoring this brief, and no person or entity other than the named *amici* and their counsel made any monetary contribution to its preparation or submission. Both parties consent to the filing of this brief.

members of current developments and issues concerning compliance with federal employment discrimination statutes.

The NAM, the Alliance, and their employer members have a vital interest in maintaining work environments that are free from harassment. *Amici* also have a substantial interest in ensuring that the standard of employer liability for the unauthorized acts of employees is interpreted consistently with the text of Title VII, and that the Court clarify the standard of employer liability so that needless litigation can be avoided. The NAM and the Alliance respectfully submit this *amici curiae* brief to bring to the Court an analysis that may not be presented by the parties.

STATEMENT

Petitioner Beth Ann Faragher worked as a lifeguard for the Parks and Recreation Department of respondent, the City of Boca Raton, Florida. Pet. App. 70a. Over the course of five years of intermittent employment as a lifeguard with the City, petitioner was subjected to uninvited and offensive touching by Bill Terry, a City employee who was one of petitioner's supervisors. Pet. App. 74a. Petitioner was also subjected to highly offensive gestures and comments by David Silverman, another lifeguard for the City who was senior to petitioner. Pet. App. 76a.

Petitioner never complained to the Parks and Recreation Department management, even when she resigned in June 1990 to attend law school. Pet. App. 81a. Petitioner did relate some of her experiences to one Robert Gordon, a co-worker who also happened to be senior to petitioner. Pet. App. 82a. As the district court found, petitioner did not talk to Gordon on a "subordinate to superior basis" but rather because she held Gordon in "high repute." Pet. App. 82a.

Subsequently, petitioner did not discourage her own sister from applying to work for the City as a lifeguard. Pet. App. 73a.

In April 1990, another lifeguard, Nancy Ewanchew, wrote a letter to the City's Director of Personnel complaining that she and other lifeguards had been sexually harassed by Terry and Silverman. Pet. App. 80a. The City investigated Ewanchew's complaint, determined that Terry and Silverman had engaged in inappropriate conduct, and promptly disciplined both men. Pet. App. 80a.

Despite the City's response to Ewanchew's complaint, in 1992 Ewanchew and petitioner -- who still had never complained to the City -- filed suit in the Southern District of Florida against the City of Boca Raton, Terry and Silverman. Pet. App. 69a. That suit included a claim against the City for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. *Id*. After a non-jury trial, the district court found the City liable to petitioner under Title VII and awarded petitioner nominal damages. Pet. App. 95a.[2] Although the district court specifically found that the City had no actual knowledge of the sexual harassment committed by Terry and Silverman, the court determined that liability could still be imputed to the City, on any one of three grounds: (1) that the conduct in question was sufficiently "pervasive" to impute "knowledge, or constructive knowledge" to the City; or (2) that Terry, Silverman and Gordon were "agents of the City" -- even though none of them was qualified as "higher

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[2] Petitioner and Ewanchew pursued other claims against respondent, Terry and Silverman. Those claims are not at issue here and therefore are not discussed.

management" -- and that on that basis the City was vicariously liable to petitioner under Title VII even in the absence of actual or constructive knowledge of the unlawful conduct; or (3) that the City had knowledge of the harassment through Gordon and failed to take remedial action. Pet. App. 92a-93a.

All of the parties appealed, on a variety of grounds. A panel of the Eleventh Circuit held, *inter alia*, that none of the district court's grounds for imputing Title VII liability to the City was meritorious. Pet. App. 68a.

On rehearing, a majority of the *en banc* Eleventh Circuit affirmed the determination that there was no valid basis for imposing Title VII liability on the City of Boca Raton. The *en banc* court reasoned that because Terry and Silverman were not acting within the scope of their employment when they harassed petitioner (Pet. App. 12a), and because their harassment was not perpetrated by means of any agency relationship with the City, the City could not be vicariously liable for Terry's and Silverman's misconduct. Pet. App. 14a. The court rejected the district court's determination that the City knew or should have known of Terry and Silverman's actions. Pet. App. 15a-18a.

Judge Barkett (joined by Chief Judge Hatchett and Judge Kravitch) dissented, criticizing the *en banc* majority for adopting a view of traditional agency principles that essentially limited employer liability for supervisor harassment to situations where the employer "knew or should have known" of the hostile environment and failed to take appropriate action. Pet. App. 18a.

SUMMARY OF ARGUMENT

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the Court concluded that Title VII does not impose automatic liability on employers for "hostile environment" sexual harassment committed by employees with a supervisory rank. Consistent with *Meritor's* analysis of Title VII liability, the court below effectively -- and correctly -- concluded that employer liability for hostile environment harassment cannot be imposed absent a showing that the employer knew or should have known of the harassing conduct and failed to take appropriate action.

Although she fails to say so explicitly, petitioner in effect urges the Court to overturn *Meritor* and to hold that employers are almost always liable for a supervisor's harassment of another employee. Petitioner advocates employer liability under two theories that act as proxies for a regime of strict liability. First, petitioner maintains that employers bear liability whenever a plaintiff reasonably feared that "she would face retaliation if she resisted, objected or complained to others" about a supervisor's harassment. Brief for Petitioner ("Pet. Br.") 22. Second, based on the argument that a supervisor's knowledge is always automatically charged to the employer, Pet. Br. 30-31, petitioner suggests that employers always will have knowledge of harassment by a supervisor, meaning that employers will face liability for failing to address even unreported harassment by a supervisor of which the employer had no reason to be aware.

To the extent that petitioner's employer liability rationale does not result in "automatic" employer liability, it requires resolution by trial of every claim of Title VII harassment. *See* Pet. Br. 19, 22, 24.

Either result contradicts both Title VII and this Court's decision in *Meritor*, and either result would both greatly expand the scope of Title VII liability and substantially increase the volume of Title VII litigation.

The Court in *Meritor* began its analysis from the premise that Congress intended courts to use common law agency principles as a guide in determining the scope of employer liability under Title VII, but the Court explicitly rejected the notion that common law agency principles should be formalistically engrafted "in all their particulars" onto the statute. *Meritor*, 477 U.S. at 72. Consistent with this view of the appropriate role of agency principles in determining employer liability, the *Meritor* Court did not embark on a lengthy analysis of various common law theories of agency liability to determine the issue of employer liability before it. Instead, the Court examined several "plainly relevant" factors to determine whether the employer should face liability. The Court's examination of those "plainly relevant" factors -- such as the adequacy of the employer's sexual harassment policy and grievance procedures -- confirms that the reasonableness of the employer's actions in a given case is the correct guidepost for determining employer liability under Title VII. 477 U.S. at 72-73. Moreover, the Court suggested in *Meritor* that an employer can insulate itself from "hostile environment" liability if the employer fulfills its Title VII obligation to institute "procedures . . . calculated to encourage victims of harassment to come forward." *Meritor*, 477 U.S. at 73.

Unfortunately, like petitioner, many courts have misread *Meritor* and failed to follow *Meritor's* analytical approach to determine employer liability. Those courts have engaged in a convoluted analysis of agency concepts in a manner that vitiates *Meritor's*

categorical conclusion that Title VII does not contemplate automatic employer liability for environmental harassment.

This case provides the Court an opportunity to further illuminate the principles announced in *Meritor* and to simplify an area of the law that has become needlessly confused and complicated. In affirming the decision below, the Court should clarify two points. First, the Court should delimit the distinction between hostile environment and *quid pro quo* supervisory harassment claims to ensure that *Meritor's* prohibition on strict liability for hostile environment claims cannot be circumvented by artful pleading or imprecise judicial analysis. Second, the Court should confirm that Title VII does not impose liability on employers for hostile environment harassment absent a finding that the employer knew or should have known of the harassment and failed to take appropriate action. In this regard, the Court should underscore its observation in *Meritor* that employers that fulfill the role Congress envisioned for them under Title VII are not liable as a matter of law for the unauthorized misconduct of their employees.

ARGUMENT

I. THE COURT SHOULD CLARIFY THE DISTINCTION BETWEEN HOSTILE ENVIRONMENT AND *QUID PRO QUO* CLAIMS UNDER TITLE VII

Like *Meritor*, this case involves a claim of "hostile environment" sexual harassment under Title VII of the Civil Rights Act of 1964. As explained below, Title VII caselaw has generally recognized a distinction between claims of "hostile environment" sexual harassment and claims of "*quid pro quo*" sexual harassment, and the classification of a sexual

harassment claim as one kind of claim or another usually determines the standard of employer liability. Accordingly, in articulating the standard governing employer liability for hostile environment claims, the Court should clarify the class of claims to which that standard applies.

A. Title VII Caselaw Recognizes A Distinction Between Hostile Environment And *Quid Pro Quo* Harassment Claims

Title VII makes it actionable for "an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1). Title VII nowhere explicitly mentions "sexual harassment." It is well-established, however, that Title VII's prohibition on discrimination "because of . . . sex" encompasses a prohibition on sexual harassment in the workplace. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20-22 (1993); *Meritor*, 477 U.S. at 64-65.

Similarly, although not evident from the statutory text, the distinction between "*quid pro quo*" and "hostile environment" sexual harassment is an accepted part of Title VII analysis. *See, e.g., Meritor,* 477 U.S. at 65; *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 495 (7th Cir. 1997) (en banc), *cert. granted sub nom. Burlington Indus. v. Ellerth*, 66 U.S.L.W. 3283 (U.S. Jan. 23, 1998) (No. 97-569). This Court held in *Meritor* that the EEOC's endorsement of a non-textual category of "hostile environment" sexual harassment not directly linked "to the grant or denial of an economic *quid pro quo*" was consistent with a "substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the

right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor*, 377 U.S. at 65 (citing 29 C.F.R. § 1604.11(a)).

Courts have determined that *quid pro quo* harassment occurs whenever "a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes that subordinate for refusing to comply." *Lipsett v. University of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988); *see also Meritor*, 477 U.S. at 65; *Spencer v. General Elec. Co.*, 894 F.2d 651, 658 (4th Cir. 1990). Because of the coercive "bargain" element present in instances of *quid pro quo* harassment, this type of harassment always requires misconduct by a supervisor with the power to determine the terms or conditions of the plaintiff's employment. *See, e.g., Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97-232); *Lipsett*, 864 F.2d at 897.

By contrast, hostile environment harassment encompasses a much broader range of circumstances that may result from the actions of any individual who intersects with the workplace, including co-workers, employees with supervisory rank and even nonemployees such as vendors and clients. *See, e.g., Harrison*, 112 F.3d at 1443; *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(e). This Court has held that, to fall within the ambit of Title VII, environmental harassment "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and

create an abusive working environment." *Meritor*, 477 U.S. at 67 (internal quotations omitted).[3] But the appropriate scope of hostile environment claims has eluded courts. *See Jansen*, 123 F.3d at 501 ("courts have been hard pressed even to define" hostile environment harassment); *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 430 (7th Cir. 1995) ("It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other."). This Court has essentially defined hostile environment harassment as a catch-all category including all "non *quid pro quo* . . . harassment [that] violates Title VII." *Meritor*, 477 U.S. at 65. Determining what is and is not a valid claim of *quid pro quo* harassment under Title VII thus directly affects the type of conduct subject to hostile environment analysis.

B. A Broad Definition Of *Quid Pro Quo* Harassment Vitiates *Meritor's* Conclusion That Title VII Does Not Impose "Automatic" Employer Liability For Hostile Environment Harassment

Appellate courts have had considerable difficulty defining the limits of *quid pro quo* sexual harassment claims. *Compare, e.g., Jansen*, 123 F.3d at 513-15, 559-60, 505 (separate opinions of Posner, C.J., and Manion & Kanne, JJ., concurring in part and dissenting in part) (concluding that an adverse job consequence is necessary to state a *quid pro quo* claim), *with Jansen*, 123 F.3d at 499 (Flaum, J., concurring) (concluding that "clear unfulfilled" or perceived threats of an adverse job action are sufficient to state a *quid pro quo* claim).

[3] As this Court has recognized, Title VII does not provide a remedy for "all workplace conduct that may be described as 'harassment.'" *Meritor*, 477 U.S. at 67.

Many courts have reserved the *quid pro quo* designation for claims involving an actual adverse job action. *See Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir. 1995) ("[A] supervisor's mere threat or promise of job-related harm or benefits in exchange for sexual favors does not constitute *quid pro quo* harassment."); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987). Other courts have applied the *quid pro quo* label expansively to include a "supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments," even if limited to "a single conversation." *Nichols v. Frank*, 42 F.3d 503, 513 (9th Cir. 1994); *see also Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir. 1987) (by "making or threatening to make decisions affecting the employment status of his subordinates," supervisor subjects his employer to strict liability) (citation omitted).

Despite the definitional uncertainty concerning the boundaries of *quid pro quo* claims, courts generally hold that employers are strictly liable for *quid pro quo* harassment. *Jansen*, 123 F.3d at 495; *Davis v. City of Sioux City*, 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols v. Frank*, 42 F.3d 503, 513-14 (9th Cir. 1994); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3d Cir. 1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994); *Sauers*, 1 F.3d at 1127; *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir. 1992); *Steele v. Offshore Shipbuilding, Inc.*,

867 F.2d 1311, 1316 (11th Cir. 1989). "In cases involving *quid pro quo* harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable' for the supervisor's wrongful conduct." *Harrison*, 112 F.3d at 1443.[4]

The likelihood that pleading an instance of workplace harassment as a *quid pro quo* claim could lead to strict liability for the employer underscores the need for the Court to clarify which harassment claims are not covered by the *quid pro quo* label. Left unresolved, the uncertainty surrounding the appropriate limitations of *quid pro quo* harassment claims threatens to impose strict liability for all harassment claims -- a result categorically rejected by the Court in *Meritor*. That danger is very real as "the *quid pro quo* concept, in its widest reach, could include any situation in which individuals must accept a gender-hostile environment in order to enjoy the tangible benefits of

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[4] Although the EEOC in its Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner ("EEOC Br.") at 15 observes correctly that "the courts of appeals have generally agreed that an employer is liable when a supervisor engages in *quid pro quo* harassment," some jurists have rejected the imposition of "automatic" employer liability for *quid pro quo* harassment as social engineering unwarranted under Title VII, traditional agency principles, and this Court's decision in *Meritor*. *See, e.g.*, *Jansen*, 123 F.3d at 517 (Coffey, J., concurring in part and dissenting in part) (criticizing imposition of strict employer liability in Tile VII cases). In any event, because the case at bar involves a claim of hostile environment harassment, the Court need not consider here the appropriate standard for employer liability in a case of *quid pro quo* sexual harassment.

their jobs." Barbara Lindemann & David D. Kadue, *Sexual Harassment in Employment Law* 8 (1992).[5]

The briefs submitted on behalf of petitioner demonstrate the ease with which essentially every hostile environment claim involving harassment by a low-level but nominally "supervisory" employee can qualify as a quasi-*quid pro quo* claim for which the employer may bear strict liability.[6] This analytical sleight of hand is accomplished by equating the archetype *quid pro quo* harassment claim -- in which a supervisory employee imposes an adverse job action based on the employee's response to the supervisor's sexual demands -- with a hostile environment perpetrated by a supervisory employee, who by nature of the supervisory role may be said to have "inherent leverage" over the employee that allows the supervisor to "rely on implicit understandings" to accomplish harassment. *See, e.g.*, EEOC Br. 9-10, 19-21, 24; Pet. Br. 24-26.

The Court should clarify that *quid pro quo* harassment encompasses at most a narrow and specific set of circumstances where a supervisor "brings about a significant alteration in the terms or conditions of his victim's employment" on account of sex. *Jansen*, 123

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[5] The Court recently granted certiorari to consider the circumstances under which a claim of *quid pro quo* harassment may be stated under Title VII. *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997) (en banc), *cert. granted sub nom. Burlington Indus. v. Ellerth*, 66 U.S.L.W. 3283 (U.S. Jan. 23, 1998) (No. 97-569).

[6] Petitioner virtually ignores the distinction between hostile environment and *quid pro quo* harassment claims, presumably because that analytical distinction is fatal to her expansive theory of employer liability.

F.3d at 512 (Posner, C.J., concurring in part and dissenting in part). Judge Posner describes these cases as cases in which a harassing supervisor uses his delegated authority and the company's machinery to accomplish a quantifiable "company act" in connection with the harassment – such as firing the victim, denying the victim a promotion, or transferring or demoting the victim. *Id.* Worded in traditional Title VII terminology, there must at a minimum be some concrete adverse job action for a plaintiff to successfully plead a *quid pro quo* claim.[7]

The Court should also explicitly reject the rationale that harassment perpetrated by an employee of supervisory rank is always *quid pro quo* harassment. To hold otherwise would preclude courts "from accounting for 'the circumstances of [each] particular case,' including the disparate corporate structures of modern business." *Jansen*, 123 F.3d at 518 (Coffey, J., concurring in part and dissenting in part) (quoting *Meritor*, 477 U.S. at 73). Imposing a higher standard of liability merely because an employee is designated as a "supervisor" disregards the varied roles of

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[7] Employer liability for a supervisor's unrealized threat to do a "company act," even if effective in persuading the victim to acquiesce in a supervisor's sexual demands, should be analyzed differently. The rationale for this distinction is simply that in case of "threatened" *quid pro quo* harassment not reasonably observed by the employer, the machinery of the company is never invoked, and thus it cannot be argued that the employer has any reason to know of the supervisor's unrealized, coercive threat. *See Jansen*, 123 F.3d at 512-13. Thus although an instance of "threatened" *quid pro quo* harassment may constitute hostile environment harassment, it is not the kind of *quid pro quo* harassment that even arguably justifies the imposition of strict liability on employers under Title VII.

individuals denominated as "supervisors" in corporate America and fails to acknowledge that traditional labels such as "worker" and "manager" have diminished relevance in many American workplaces. *See generally* Fact Finding Report: Commission On The Future Of Worker-Management Relations 29-45 (Dep't Labor/Dep't Com. May 1994) (discussing shift in American workplaces from hierarchical management scheme to other organizational approaches that highlight both employee involvement and team-based management).

Harassment claims that do not constitute *quid pro quo* harassment under the above definition may constitute environmental harassment under Title VII. A particular case may also present elements of both *quid pro quo* and hostile environment harassment. *See, e.g., Jansen*, 123 F.3d at 493. But as long as courts rely on the classification of claims to determine the appropriate standard of employer liability, only vigilant attention to the analytical distinction between the two types of harassment will preserve *Meritor*'s prohibition on "automatic" employer liability in hostile environment cases.

II. COURTS SHOULD DETERMINE EMPLOYER LIABILITY FOR HOSTILE ENVIRONMENT CLAIMS UNDER A COMMON LAW NEGLIGENCE STANDARD

A. Application Of A Negligence Standard Is Consistent With *Meritor's* Title VII Analysis

This Court held in *Meritor* that Title VII does not impose automatic liability on employers for "hostile environment" sexual harassment committed by employees with a supervisory rank. *Meritor*, 477 U.S.

at 72. The Court's analysis in *Meritor* requires that any appropriate determination of employer liability for a supervisor's creation of a hostile environment focus on the employer's negligence, if any, in failing either to know of or to respond reasonably to harassment in the workplace.

Although the Court declined "to issue a definitive rule on employer liability" in *Meritor*, the Court provided several guideposts for determining the appropriate scope of employer liability for supervisor harassment. First, the Court determined that Congress intended courts to use common law agency principles as a guide in determining the scope of employer liability. *Id.* The Court disavowed, however, any notion that common law agency principles should be formalistically engrafted onto Title VII, stating that "common-law principles may not be transferable in all their particulars to [the] Title VII [context]." *Id.* Instead, the Court suggested that the analysis of employer liability should comport with "Congress' . . . intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.*

Second, the Court identified several practical considerations that are "plainly relevant" to an analysis of employer liability for supervisor harassment. Among these factors are the employer's provision of both an adequate policy against discrimination and a grievance procedure "calculated to encourage victims of harassment to come forward." *Id.* at 72-73. The Court also held that a complaining party's "failure to invoke [the employer's] procedure" is also "plainly relevant" to the analysis of employer liability. *Id.* Finally, the Court suggested that an employer can insulate itself from environmental harassment liability if the employer fulfills its Title VII obligation to

institute "procedures . . . calculated to encourage victims of harassment to come forward" and the plaintiff either eschews those procedures or chooses to invoke them, and the employer responds adequately to the employee's complaint. *Id.* at 73. The Court's approach thus sensibly recognized that the conduct of *both* the employer and the plaintiff employee is relevant to a determination of employer liability under Title VII.

Meritor, and a decade of decisions by federal courts applying the *Meritor* analysis to myriad fact patterns, suggest a number of factors that may be relevant to determining whether an employer has acted reasonably to know about instances of harassment in the workplace and to remedy misconduct of which it was, or should have been, aware:

1. The existence of a clear policy denouncing sexual harassment; *see, e.g., Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548, 1554 (11th Cir. 1997) ("[O]nce a company has developed and promulgated an effective and comprehensive anti-sexual harassment policy, aggressively and thoroughly disseminated the information and procedures contained in the policy to its staff, and demonstrated a commitment to adhering to this policy, it has fulfilled its obligation to make reasonably diligent efforts to 'know what is going on' within the company");

2. The existence of grievance procedures calculated to provide aggrieved employees with a reasonable avenue of complaint; *see, e.g., Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 110 (3d Cir. 1994) ("[W]e hold that an effective grievance procedure--one that is known to the

victim and that timely stops the harassment--shields the employer from Title VII liability for a hostile environment");

3. Reasonable dissemination of such policies and grievance procedures; *see, e.g., Gary,* 59 F.3d at 1398 (employer not liable where it "had pursued an active and firm policy against sexual harassment" and "had a detailed grievance procedure" for the processing and review of complaints);

4. Reasonable response to any complaints received, including adequate remedial action. *See, e.g., Knabe v. Boury Corp.,* 114 F.3d 407, 412 (3d Cir. 1997) (if investigation is undertaken, "employer cannot be held liable for the hostile work environment created by an employee under a negligence theory of liability unless the remedial action taken subsequent to the investigation is also lacking"); *Kilgore v. Thompson & Brock Management, Inc.,* 93 F.3d 752, 754 (11th Cir. 1996) (employer liable under Title VII only if employer "failed to take prompt remedial action after receiving notice of the alleged sexual harassment").

This is, of course, not an exhaustive list of the factors that may inform a court's analysis of employer liability for environmental harassment. Moreover, although none of these factors is likely to be dispositive in every case, *Meritor* indicates that employers who provide adequate procedures and mechanisms for addressing harassment in the workplace are not liable as a matter of law if plaintiffs fail to avail themselves of the procedures and the employer has no other avenue to know of, much less to address, an instance of workplace harassment.

B. Imposing Employer Liability Based On Common Law Agency Principles Other Than Negligence Is Contrary To *Meritor*

This Court held in *Meritor* that Congress intended courts to "look to agency principles for guidance" in determining employer liability under Title VII. *Meritor*, 477 U.S. at 72. Consistent with the Court's view of the appropriate role that common law agency principles should play in the determination of employer liability, the Court conducted a negligence-based analysis of the facts before it. *Id.* at 72-73.

Negligence, however, is only one of numerous common law bases on which "a master" was historically liable for the torts of "his servants." *See Restatement (Second) of Agency* § 219. Section 219 of the *Restatement (Second)* lists five bases for such liability including negligence.[8] Importantly, none of these "traditional agency principles" other than

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[8] Section 219 of the *Restatement (Second)* provides:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences,

(b) the master was negligent or reckless,

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

negligence receives any attention in the *Meritor* Court's analysis. Indeed, *Meritor* contains no discussion of the *Restatement (Second) of Agency* at all.[9]

Some courts have nevertheless become so embroiled in a formalistic analysis of traditional agency principles that they have both failed to heed this Court's warning that those principles are not fully transferable to the Title VII context, and ignored the example of this Court's application of common law negligence principles to the facts presented in *Meritor*. The results have been confusing, and often inconsistent with this Court's teachings in *Meritor*, and with decisions reached by other courts on strikingly similar facts. As Judge Posner has observed, "judges can in good faith reach opposite results when they seek guidance in the *Restatement* to [determine] employers' liability for sexual harassment by supervisory employees." *Jansen*, 123 F.3d at 509 (Posner, C.J., concurring in part and dissenting in part) (citing *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997)).

In any event, because many courts have found confusion where the Court intended them to find guidance, it is helpful to address briefly the bases for liability articulated in section 219 of the *Restatement (Second)* to explain why agency concepts unrelated to negligence are not readily transferable to the specific

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[9] *Meritor* relegates the importance of the *Restatement (Second) of Agency* to a "*see generally*" cite, *see Meritor*, 477 U.S. at 72, which means only that the "[c]ited authority presents helpful background material related to the proposition." *The Bluebook: A Uniform System of Citation* 23 (16th ed. 1996).

context of employer liability for environmental harassment under Title VII.

1. "Scope Of Employment" Liability Under Section 219(1)

The first stated conceptual basis of liability under section 219 -- that an employer is liable for the torts of its employees "committed while acting in the scope of their employment" -- is obviously ill-suited to the sexual harassment context. As the EEOC concedes, "[w]hen sexual harassment is intended solely to further private aims, rather than a purpose of the employer, it is outside the scope of employment." EEOC Br. 17 n.3. Many courts, including the Eleventh Circuit in this case, have recognized the self-evident proposition that sexual harassment is perhaps uniquely linked to "private aims." Pet. App. 12a ("This case provides the archetypical example of employees stepping outside of the scope of their employment and seeking to further personal ends."); *see also Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) (holding that unlawful sexual harassment is an illegitimate activity, beyond the scope of the supervisor's employment). Even so, in the rare instances where the harasser acts under a belief that his harassment "further[s] a purpose of the employer," EEOC Br. 17 n.3, automatic employer liability under a "scope of employment" theory is unwarranted. Instead, courts can readily assess under a negligence standard whether the employer bears any culpability related to the harassment.

2. "Intended The Conduct Or Consequences" Liability Under Section 219(2)(a)

The second stated conceptual basis of liability under section 219 -- that an employer is liable if the employer "intended the conduct or the consequences" -- is

equally ill-suited for application to the sexual harassment context. Employers obviously do not rationally intend for sexual harassment to occur. To the contrary, employers are interested in maintaining productive work environments free from harassment of any kind. In any event, an employer that may be said to "intend" the "consequences" of sexual harassment by adopting an unreasonable approach to the unfortunate reality of sexual tensions and misconduct in the workplace would face Title VII liability under a negligence standard.

3. "Non-Delegable Duty" Liability Under Section 219(2)(c)

Another stated conceptual basis of liability under section 219 would hold an employer liable if a supervisor's creation of a hostile environment "violated a non-delegable duty of the master." Some commentators have suggested that this concept is transferable to the Title VII context on the theory that employers have a duty to keep their employees safe from a sexually hostile environment. *See, e.g.*, David B. Oppenheimer, *Exacerbating The Exasperating: Title VII Liability Of Employers For Sexual Harassment Committed By Their Supervisors*, 81 Cornell L. Rev. 66 (1995); Justin S. Weddle, *Note: Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty To Prevent A Hostile Workplace*, 95 Colum. L. Rev. 724 (1995). This view is an unabashed route to automatic employer liability for any workplace harassment and has no judicial adherents. Indeed, most courts do not analyze, if they even mention, the "non-delegable duty theory" of agency liability when analyzing employer liability for environmental harassment. *See*, *e.g.*, Pet App. 10a; *Bouton*, 29 F.3d at 106.

4. "Apparent Authority" and "Aided By The Agency Relation" Liability Under Section 219(2)(d)

Courts have summarized section 219(2)(d) as providing a basis of employer liability for environmental harassment when either the plaintiff "relied upon [the] apparent authority" of the supervisor to harass or when the supervisor's wrongful conduct was "aided by the agency relationship." *Bouton*, 29 F.3d at 106. This final conceptual basis of liability under section 219 has created the greatest analytical difficulty for courts and consequently caused the most mischief.

As an initial matter, common law agency principles such as "apparent authority" or "aided by the agency relationship" are terms suited to analysis of claims of *quid pro quo*, rather than hostile environment harassment. *See* EEOC Br. 15 ("supervisor [who] fires an employee because she refuses to submit to an advance . . . is necessarily aided in accomplishing the tort by the existence of the agency relation.") (internal quotation omitted); *see also* Barbara Lindemann & David D. Kadue, *Sexual Harassment in Employment Law* 129 (1992) ("The essence of the *quid pro quo* theory of sexual harassment as a violation of Title VII is that someone relies upon his apparent or actual authority to extort sexual consideration from an employee.") (internal quotation omitted). Reliance on these common law agency principles to determine employer liability for environmental harassment blurs the analytical distinction between *quid quo pro* and hostile environment harassment and can result in the imposition of strict liability for environmental harassment in violation of *Meritor*. *See*, *e.g.*, *Karibian*, 14 F.3d at 78-81.

The common law concepts of "apparent authority" and "aided by the agency relationship" are hopelessly vague and only confuse the analysis of employer liability for environmental harassment. Thus, although some courts have correctly rejected the proposition that employees can reasonably believe that their supervisors have "apparent authority" to engage in harassing conduct, *see, e.g.*, *Jansen*, 123 F.3d at 548-50 (Coffey, J., concurring in part and dissenting in part); *Gary*, 59 F.3d at 1397-98, petitioner argues that a plaintiff's fear of a supervisor's "power" to retaliate *always* raises at least a jury question on whether the supervisor's "apparent authority" facilitated the harassment. Pet. Br. 22-24. At its extreme, this latter line of reasoning is an indirect route to strict employer liability for any supervisor harassment. At a minimum, this kind of reasoning mandates trial of every harassment allegation involving an employee of supervisory rank.

The inquiry whether a supervisor's harassing conduct was "aided by the agency relationship" proves similarly difficult to apply in practice. Most courts, and the EEOC here, agree that a supervisor is not "aided by the agency relationship" in accomplishing the hostile environment if the supervisor "simply takes advantage of his proximity to an employee in the same way that a co-worker would." EEOC Br. 18; *see also Gary*, 59 F.3d at 1396. Rather, as the court below held, the employer is liable under an agency theory "only if the harassment is accomplished by an instrumentality of the agency or through conduct associated with the agency status." Pet. App. 13a & n.8 (citing the example from the *Restatement* comment that "a telegraph company may be held liable for a tort committed by a telegraph operator who sends a false telegraph message.").

Other courts have disagreed with the court below and employed a broad reading of "aided" in the common law rule. Under such an analysis, employer liability for supervisor harassment again becomes a foregone conclusion because, as petitioner describes it, supervisors are always aided in accomplishing harassment by the "implicit threats and obvious inherent dangers" that accompany the power structure of the supervisory relationship. Pet. Br. 24. This is precisely the kind of "automatic liability" rejected by the Court in *Meritor*.

A decade of post-*Meritor* caselaw shows that courts that mistakenly rely on agency principles other than negligence to determine employer liability for environmental harassment do so with one of two results, either of which is inconsistent with *Meritor*. Some courts, like the *en banc* court below, engage in a belabored and needlessly complicated analysis of traditional common law agency principles that ends up focusing on negligence anyway. Other courts focus on common law agency factors in a manner that blurs the distinction between hostile environment and *quid pro quo* harassment claims, often with the result of imposing strict liability on employers for hostile environment harassment. As the above analysis shows, the Court should explicitly reject common law agency theories other than negligence to analyze employer liability.

III. APPLICATION OF A NEGLIGENCE STANDARD IS CONSISTENT WITH TITLE VII

A negligence standard of employer liability for hostile environment harassment balances the goals embodied in Title VII without imposing liability on conscientious employers for their inability to eliminate

the social ill of sexual harassment from the workplace. Any higher standard of employer liability constitutes an unsubstantiated judicial extension of employer liability not contemplated by Title VII.

Amazingly, the EEOC justifies its support of a legal standard "imposing liability on employers for the acts of their agents without regard to employer fault" on the ground that such a standard will act as a "catalyst" for employers to "formulate the kind of hiring practices, training methods, review processes, complaint procedures, and disciplinary measures" to eradicate sexual harassment in the workplace (EEOC Br. 22). The Administration's uncharted "catalyst" approach is pure social engineering, unrestrained by the text of Title VII, the legislative history of the statute, or the Court's decision in *Meritor*.[10] Aside from whatever politically correct appeal might attach to the EEOC's endorsement of "a zero tolerance" approach to employer liability for sexual harassment, a negligence standard will achieve Congress's legitimate policy aims as reflected in Title VII.

As an initial matter, employers already have strong incentives to discourage sexual harassment in the workplace, among them that employers desire to maintain a productive workplace free from harassment of any kind. That legitimate employer interests have been at least seriously misunderstood is evidenced by the statement by Eleventh Circuit Judge Tjoflat that employers might rationally "opt" to conceal from its employees the identity of the individual to whom claims about violations of the employer's sexual

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[10] That the government believes the standard it advocates comports with Title VII and this Court's directive in *Meritor* is testament to the need for clearer standards in this area.

harassment policy should be made in an effort to reduce the "cost of doing business." Pet. App. 37a (Tjoflat, J., concurring in part and dissenting in part). That statement ignores the realities of the litigation environment in which employers find themselves -- where more employment-related cases are being filed than ever before and courts are inexplicably more willing to find employers liable for unauthorized employee conduct even when an employer has "a model system" in place for addressing sexual harassment claims. *Id.*[11] In addition, even assuming employers could adopt an approach to workplace harassment that "yield[ed] more sexual harassment but less liability," *id.*, the non-litigation driven interests of employers -- such as the desire to foster a productive working environment that is conducive to attracting and retaining skilled workers in a shrinking labor pool -- would provide sufficient incentives for employers to take all reasonable steps to eradicate harassment from the workplace. Many employers thus already have the "zero-tolerance" approach to workplace harassment advocated by petitioner, but the expansive liability scheme endorsed by petitioner would penalize even these employers. Pet. Br. 20.

The EEOC Guidelines state that "[p]revention is the best tool for the elimination of sexual harassment." 29 C.F.R. § 1604.11(f). The EEOC guidelines recognize that even the most diligent employer cannot prevent all instances of workplace harassment, but must instead at times address such incidents after the fact by prompt remedial action. Thus, the EEOC Guidelines instruct employers to develop "appropriate sanctions" for

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[11] Moreover, under current law in most circuits, employers face strict liability for *quid quo pro* sexual harassment claims.

inappropriate workplace conduct and to inform "employees of their right to raise and how to raise the issue of harassment under Title VII." 29 C.F.R. § 1604.11(f).

A negligence standard holds employers responsible for taking reasonable steps to prevent, to detect and to address sexual harassment in the workplace. A negligence standard also recognizes that a workable approach to preventing sexual harassment in the workplace must necessarily allocate to both employers and employees the responsibility to report and address instances of sexual harassment.

Imposing liability on employers who have taken reasonable steps to deter sexual harassment in the workplace is not contemplated by Title VII. Further, imposing a no-fault liability regime on employers -- either directly or through a convoluted and uncertain application of traditional agency principles -- will have negative consequences. "The imposition of liability beyond that which is likely to deter sexual harassment serves no constructive purpose and unnecessarily imposes costs on employers, costs that are ultimately passed on." *Jansen*, 123 F.3d at 498 (Flaum, J., concurring). Ultimately, these costs will be assessed against consumers and workers -- in the form of higher prices for the employer's products and lower wages. *See Jansen*, 123 F.3d at 510-11 (Posner, C.J., concurring in part and dissenting in part).

To the extent individuals conform their decisions to incentives created by the law, imposing no-fault liability on employers for environmental harassment may actually discourage reporting of sexual harassment complaints. If employers are liable for sexual harassment even if they had no knowledge of the harassment and no complaint was made, victims may

rationally choose not to use the employer's complaint process, but to sue instead, depriving the employer of the opportunity to remedy the situation promptly, to the benefit of all employees.

Finally, holding employers liable that have taken reasonable steps to deter sexual harassment in the workplace may also incentivize employers to take *unreasonable* steps to deter harassment. Such steps would not be cost effective in the traditional sense because they would impose extreme costs on employers (and consumers and workers) while achieving negligible deterrent effects. Such steps could also take the form of curtailing employee freedom, such as putting employees under constant video or audio surveillance. *Id.* at 511.[12]

Congress surely did not intend for Title VII to work such nonsensical results. To the contrary, Title VII reflects Congress' desire to avoid undue burdens on private businesses while at the same time accomplishing Title VII's ultimate statutory goals. *See, e.g., United Steelworkers of Am. v. Weber*, 443 U.S. 193, 207 (1979). For all of the reasons discussed above, a negligence standard of employer liability for hostile environment harassment best promotes the shared objectives of employers and Title VII with respect to sexual harassment.

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[12] Even if employers were unlikely to resort to such lengths, a strict liability regime would likely result in more subtle workplace changes as employers may rationally decline to foster social interaction among employees.

CONCLUSION

The Court should affirm the *en banc* decision of the court below, which in effect employed a negligence analysis, and reaffirm the principle that employer liability for hostile environment sexual harassment should be determined by reliance on negligence principles.

January 28, 1998

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BETH ANN FARAGHER,
Petitioner,

v.

CITY OF BOCA RATON,
a political subdivision of the State of Florida,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*.[1] Letters of consent from all parties have been filed with the Clerk of the Court. The brief urges this Court to affirm the decision below, and thus supports the position of Respondent the City of Boca Raton before this Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976

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[1] Counsel for EEAC authored the brief in its entirety. No person or entity, other than EEAC, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

to promote sound approaches to the elimination of employment discrimination. Its members include over 300 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), as well as other equal employment statutes and regulations. As employers, and as potential respondents to discrimination charges, EEAC's members will be directly affected by the Court's determination as to when an employer can be held liable under Title VII for "hostile environment" sexual harassment by a supervisor.

Thus, the issues presented in this case are extremely important to the nationwide constituency that EEAC represents. Pursuant to this Court's direction in *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57 (1986), a majority of the Eleventh Circuit sitting *en banc* applied agency principles to determine that, under the facts of this case, the employer could not be held liable under Title VII for environmental sexual harassment by two low-level supervisors. Using interpretations of agency principles that are consistent with those applied by most other circuit courts of appeals, the court below concluded that "employers are not automatically liable for hostile environment sexual harassment by their employees," Pet. App. 9a, but may be held "indirectly, or vicariously liable" for hostile environment sexual harassment: (1) when a harasser is acting within the scope of his employment in perpetrating the harassment, and (2) when a harasser is acting outside the scope of his employment, but is aided in accomplishing the harassment by the existence of the

agency relationship. *Id.* at 10a (internal citations and footnotes omitted). In all other circumstances, the court below held, employers may be held directly liable only if they "knew, or upon reasonably diligent inquiry should have known of the harassment and failed to take immediate and appropriate corrective action." *Id.* at 7a. Applying these principles to the facts of this case, the court below concluded that the City was not liable for the acts of environmental sexual harassment committed by the supervisors in this case.

Petitioner challenges not the general principles articulated by the court below, but the way in which the court applied them. The interpretations advocated by Petitioner and her *amici,* taken together, construct a box that has the consequence of automatic liability for an employer. Petitioner also seeks to convert the existence of a sexual harassment policy and complaint procedure from a defense to an affirmative requirement, absent which an employer will be charged with constructive knowledge of sexual harassment anywhere in its organization.

EEAC's members have a strong interest in maintaining workplaces that are free from sexual harassment. EEAC's member companies long ago recognized that sexual harassment in the workplace is bad business, causing employees to be less productive, less satisfied with their jobs, and ultimately less likely to stay with the company. Likewise, EEAC's member companies are committed to maintaining a work environment that is free from discrimination, and are well aware that sexual harassment that creates a hostile work environment is sexual discrimination.

Accordingly, EEAC's members have followed this Court's guidance in *Meritor* for eliminating and combatting sexual harassment by adopting policies expressly forbidding supervisors and employees from engaging in sexually harassing conduct; by publicizing in employee manuals and notices an employee's right to be free from sexual harassment in the workplace; and by training supervisors

and employees to recognize and halt harassment in the workplace. In addition, EEAC's members have implemented formal anti-harassment procedures that allow aggrieved employees to seek redress from higher management authorities, or even bring internal complaints against supervisors or co-workers who have engaged in harassment in the workplace. These policies call for prompt and effective remedial action by the employer, including discipline and, where appropriate, discharge of the offender.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus curiae* in numerous cases before this Court, the United States Courts of Appeals, and various state supreme courts. As part of this activity, EEAC participated as *amicus curiae* in *Meritor* and other cases in this Court addressing sexual harassment issues. *E.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (holding that hostile environment harassment need not cause psychological damage to be actionable); *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 2430 (1997) (same-sex harassment).

In addition, EEAC participated in several cases in the courts of appeals regarding the precise issues presented in this case. *E.g., Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997), *cert. granted sub nom. Burlington Indus. v. Ellerth*, 1998 U.S. LEXIS 643 (U.S. Jan. 23, 1998) (No. 97-569); *Sims v. Brown & Root Indus. Servs., Inc.*, 78 F.3d 581 (5th Cir. 1996) (table case); *Kotcher v. Rosa & Sullivan Appliance Ctr.*, 957 F.2d 59 (2d Cir. 1992). Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns involved in this case.

EEAC seeks to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant

matter that has not already been brought to its attention by the parties. Because of its experience in these matters, EEAC is well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Petitioner Beth Ann Faragher worked intermittently as a lifeguard for the City of Boca Raton, Florida's Parks and Recreation Department Marine Safety Section between September 1985 and June 1990. Pet. App. 2a. Under the Section's chain of command, lifeguards reported to Marine Safety lieutenants and then to captains, who reported to the Chief of the Marine Safety Section, who reported to the Recreation Superintendent, who reported to the Director of Parks and Recreation, who reported to the City Manager. *Id.* at 3a.

Faragher resigned in June 1990 to attend law school. *Id.* at 3a. In April 1990, two months before Faragher resigned, Nancy Ewanchew, a former lifeguard who had resigned in April 1989 to take a better job, wrote to the City's Personnel Director complaining that during her tenure with the City, she and other female lifeguards had been sexually harassed by two supervisory employees. *Id.* at 4a. The City investigated, and concluded that David Silverman, a Marine Safety lieutenant, and Bill Terry, the Chief of Marine Safety, had engaged in inappropriate conduct. *Id.* The City disciplined both Silverman and Terry. *Id.*

Faragher sued the City in 1992 for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Terry and Silverman under 42 U.S.C. § 1983. She also brought a number of pendent state law claims, suing Terry for battery, and the City for negligent retention and supervision of Terry. *Id.* Following a non-jury trial, the district court entered judgment in Faragher's favor on her Title VII claim, and awarded her $1 in

nominal damages. *Id.* The court also found in Faragher's favor on her § 1983 and battery claims, and awarded her $10,000 in compensatory damages and $500 in punitive damages respectively on those claims. *Id.* at 69a-104a. Both parties appealed. An Eleventh Circuit panel reversed the judgment for Faragher on her Title VII claim, but affirmed the rest of the district court's ruling. *Id.* at 41a-68a. The Eleventh Circuit vacated the panel opinion and granted rehearing *en banc*. The Eleventh Circuit *en banc* reversed the district court's judgment in favor of Faragher on her Title VII claim, affirming the ruling in all other respects. *Id.* at 18a.

SUMMARY OF ARGUMENT

The court of appeals properly applied agency principles, as directed by this Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), to hold that an employer is not liable for environmental sexual harassment by a supervisor, unless the supervisor had apparent authority to harass, or the employer had notice of the conduct and failed to act promptly to stop it. An employer is not automatically liable for environmental sexual harassment by a supervisor. *Meritor*, 477 U.S. at 72. Sexual harassment is virtually always outside of the scope of a supervisor's employment. *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3137 (Aug. 6, 1997) (No. 97-232); *Torres v. Pisano*, 116 F.3d 625, 634 n.10 (2d Cir.), *cert. denied*, 118 S. Ct. 563 (1997); *Bouton v. BMW of N. Am.*, 29 F.3d 103 (3d Cir. 1994); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996).

Accordingly, as the court below correctly held, an employer may be held vicariously liable for a supervisor's environmental sexual harassment only where the employer has affirmatively conferred apparent authority to commit harassment, and the victim reasonably believes such authority exists, and the supervisor actually uses that authority in committing the harassment. The lack of a policy against sexual harassment does not create apparent authority by negative inference.

Absent an exercise of actual or apparent authority, an employer can be held liable only if the employer itself was negligent; *i.e.*, it knew or had reason to know the harassment was occurring and failed to take prompt action to stop it. A finding of notice to the employer requires notice to someone sufficiently high in the employer organization; notice to, or harassment by, a lower-level supervisor will not suffice.

Although the absence of a formal policy against sexual harassment will not in and of itself create liability for the employer, the existence of a well-communicated, express policy against harassment, together with an adequate complaint procedure, should shield an employer from liability for a supervisor's sexual harassment where the victim fails to invoke the policy, and where the employer takes prompt, appropriate action in response to a complaint.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY APPLIED AGENCY PRINCIPLES, AS DIRECTED BY THIS COURT IN *MERITOR*, TO HOLD THAT AN EMPLOYER IS NOT LIABLE FOR ENVIRONMENTAL SEXUAL HARASSMENT BY A SUPERVISOR UNLESS THE SUPERVISOR USED ACTUAL OR APPARENT AUTHORITY OR THE EMPLOYER FAILED TO ACT DESPITE NOTICE OF THE HARASSMENT

A. An Employer Is Not Automatically Liable for Environmental Sexual Harassment

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, makes it unlawful for an employer to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1). In

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), this Court concluded that, "plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." 477 U.S. at 66. *See also Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (establishing standards for determining when an environment is sufficiently hostile or abusive to be actionable).

Title VII does not render employers automatically liable for sexual harassment. *Meritor*, 477 U.S. at 72. While this Court in *Meritor* "decline[d] the parties' invitation to issue a definitive rule," *id.*, it did reject an automatic liability standard, holding that, "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.*

Instead, this Court stated that:

> [W]e agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. . . . *See generally* Restatement (Second) of Agency §§ 219-237 (1985). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability.

Id.

Since *Meritor*, the courts of appeals have adapted agency principles, as this Court directed, to determine whether and when an employer can be held responsible for environmental sexual harassment created by an employee with supervisory responsibilities. The *en banc* decision of the court below reflects a consensus of the majority of these courts as to *how* agency principles properly are applied.

Common law agency principles establish that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement (Second) of Agency § 219(1) (1958). Conversely,

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219(2) (1958).

The decision below is representative of the way in which the courts of appeals have extrapolated these principles to apply in environmental sexual harassment cases. The court below concluded that employers may be held "directly" liable for environmental sexual harassment by a supervisor where they "knew, or upon reasonably diligent inquiry should have known of the harassment and failed to take immediate and appropriate corrective action." Pet. App. at 7a. Where the employer had no such knowledge, it still can be "indirectly, or vicariously liable" for hostile environment sexual harassment: (1) when a harasser is acting within the scope of his employment in perpetrating the harassment, and (2) when a harasser is acting outside the scope of his employment, but is aided in accomplishing the harassment by the existence of the

agency relationship. Pet. App. at 10a (internal citations and footnotes omitted).

B. Sexual Harassment Is Virtually Always Outside of the Scope of a Supervisor's Employment

A supervisor generally acts within the scope of the employment when he or she hires, fires, disciplines, promotes, or directs the day-to-day work of the employees he or she supervises.[2] Under agency principles, sexual harassment is not within the scope of employment, so that employers rarely are held liable under § 219(1).

According to the Restatement, "[c]onduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency § 228(2) (1958). In Policy Guidance issued by the Equal Employment Opportunity Commission, the federal agency having enforcement authority over Title VII, the agency noted that "[i]t will rarely be the case that an employer will have authorized a supervisor to engage in sexual harassment." *Policy Guidance on Current Issues of Sexual Harassment*, No. N-915-050, *reprinted in EEOC Compliance Manual* (BNA), N:4031, 4055 (Mar. 19, 1990). Similarly, sexual harassment cannot be said to "serve the purposes" of the employer; precisely the opposite is true. Sexual harassment—or any form of harassment, for that matter—is likely to be distracting, demoralizing, and ultimately debilitating to an employee's productivity. An employee who has to "run a gauntlet of sexual abuse," *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (quoted in *Meritor*, 477 U.S. at 67), likely will have difficulty focusing on the work for which she is paid. Thus, if anything, sexual harassment is antithetical to the purposes of the employer.

[2] The Restatement defines "scope of employment" as follows:

> Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master; and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Restatement (Second) of Agency § 228(1) (1958).

For this reason, numerous courts of appeals have concluded that under normal circumstances, an employer is not liable for sexual harassment on the ground that a supervisor was acting within the scope of his employment. The court below correctly observed that "an agent is not acting within the scope of his employment when he is 'going on a frolic of his own'." Pet. App. 10a (citation omitted). As the Tenth Circuit has pointed out, "§ 219(1) is rarely applicable in hostile work environment cases because '[s]exual harassment simply is not within the job description of any supervisor or any other worker in any reputable business'." *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir. 1997). *See also Torres v. Pisano*, 116 F.3d 625, 634 n.10 (2d Cir.) (quoting *Harrison*), *cert. denied*, 118 S. Ct. 563 (1997). Similarly, the Third Circuit has concluded that "in a hostile environment case, the harasser is not explicitly raising the mantle of authority to cloak the plaintiff in an unwelcome atmosphere. Employer liability should not be imputed under § 219(1) without use of actual authority." *Bouton v. BMW of N. Am.*, 29 F.3d 103 (3d Cir. 1994). *Accord Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) (noting that Fourth Circuit "precedent rests on the presumption that illegal sexual harassment is an illegitimate corporate activity, beyond the scope of supervisors' employment.").[3]

[3] The Sixth Circuit's contrary view is not creditable. In the Sixth Circuit, the determination of whether environmental sexual harassment was within the scope of a supervisor's employment depends

Where there is any doubt, the fact that an employer has specifically forbidden an act is, under traditional agency principles, evidence that an act is outside the scope of employment.[4] An example offered by the Restatement explains, "where a person employs another to make collections, a specific direction by such employer that servants shall not use force in seeking to collect debts is a factor tending to show that an assault made by the servant to enforce collection is not within the scope of employment." Restatement (Second) of Agency § 230 cmt. c. (1958). Thus, where there is any doubt whether a supervisor's creation of a sexually hostile working environment is within the scope of his employment, the existence of a company policy forbidding sexual harassment is evidence that it is not.

Environmental sexual harassment is virtually always outside the scope of a supervisor's employment, so that such cases are not subject to analysis under § 219(1).

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upon "when the act took place, where it took place, and whether it was foreseeable." *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987). In the Sixth Circuit's view, harassment at the workplace during working hours by someone with authority to hire and fire occurs within the scope of that supervisor's employment. *Id.* In addition, the existence of a policy prohibiting sexual harassment hurts rather than helps the employer's position, since it serves as evidence that harassment was foreseeable. *Id.* The Sixth Circuit's view, which is not supported by any reasoning other than repetition of the general reference to the Restatement of Agency sections cited in *Meritor*, is simply illogical and should not be followed by this Court.

[4] Restatement (Second) of Agency § 230 cmt. c. (1958) states in pertinent part:

> Prohibition to do any acts except those of a certain class may indicate that the scope of employment extends only to acts of that class. Furthermore, the prohibition by the employer may be a factor in determining whether or not, in an otherwise doubtful case, the act of the employee is incidental to the employment; it accentuates the limits of the servant's permissible action and hence makes it more easy to find that the prohibited act is entirely beyond the scope of employment.

Accordingly, the Court of Appeals ruled correctly that the accused supervisors were not acting within the scope of their employment, and that the City therefore was not liable for their conduct under that theory.

C. Liability of an Employer Under an "Apparent Authority" Theory Is Limited to Situations Where the Victim Reasonably Believed That the Supervisor Had Apparent Authority and the Supervisor Actually Used That Authority

Most of the circuit courts of appeals will consider an employer potentially liable for a supervisor's creation of environmental sexual harassment under § 219(2)(d) of the Restatement, which imputes liability when "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." *Bouton v. BMW of N. Am.*, 29 F.3d 103, 108 (3d Cir. 1994). In general, these courts are willing to consider liability under § 219(2)(d) because, unlike situations involving mere co-workers, supervisors have at least some degree of greater control over the workplace that co-workers lack.[5]

Courts using this theory, including the court below, have applied it very narrowly, staying close to the relevant agency principles. According to the Restatement, "apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to

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[5] As the Brief of the United States points out, the courts of appeals agree that the appropriate standard in environmental sexual harassment case involving co-workers is whether "the employer knew or should have known of the harassment and failed to take appropriate action." *Br. for the United States & the Equal Employment Opportunity Commission as Amici Curiae Supporting Pet'r* at 16.

act for him." Restatement (Second) of Agency § 27 (1958). Applying this principle to sexual harassment cases requires the purported victim to show both that she had a reasonable belief that the perpetrator had apparent authority to commit the harassment, and that some affirmative act of the employer created such apparent authority.

1. *For Apparent Authority to Exist, the Victim's Belief That the Perpetrator Had the Authority Must Be Reasonable*

An employer cannot be liable under an "apparent authority" theory unless the victim reasonably believed that the perpetrator indeed had such authority. As the Third Circuit has explained, "Our agency precedent requires the belief in the agent's apparent authority to be reasonable before the principal will be bound." *Bouton*, 29 F.3d at 109. *Accord Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir.), *cert. denied sub nom. Gary v. Washington Metro. Area Transit Auth.*, 116 S. Ct. 569 (1995) (citing *Bouton*). *See also* Restatement (Second) of Agency § 8 cmt. c. ("apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized").

In our society, there is increasing awareness that sexual harassment is inappropriate and frequently unlawful. Press reports on sexual harassment cases and other media attention to the issue have disseminated information to the extent that few workers in the United States today have any doubt that workplace sexual harassment is against the law. If anything, the common perception of what type of behavior constitutes hostile environment "sexual harassment" is broader than the legal definition. Against this background, common sense dictates that a victim asserting a belief in a perpetrator's authority to harass her must make some affirmative showing that her belief was reasonable under the circumstances.

2. *Absence of an Anti-Harassment Policy Does Not Automatically Confer Apparent Authority*

Undoubtedly, one of the most effective ways for an employer to negate any reasonable belief that an employee has authority to commit sexual harassment is to have an explicit, well-communicated policy forbidding harassment coupled with an effective complaint procedure. *Bouton*, 29 F.3d at 110 ("A policy known to potential victims also eradicates apparent authority the harasser might otherwise possess."). *See also Policy Guidance on Current Issues of Sexual Harassment*, No. N-915-050, *reprinted in EEOC Compliance Manual* (BNA), N:4031, 4056 (Mar. 19, 1990) ("[A]n employer can divest its supervisors of this apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure. When employees know that recourse is available, they cannot reasonably believe that a harassing work environment is authorized or condoned by the employer.").

Under agency principles, the creation of apparent authority requires an *affirmative* act on the part of the principal. *See generally* Restatement (Second) of Agency § 27. Thus, apparent authority cannot be created by negative inference. For this reason, neither the lack of an anti-harassment policy, nor the failure to disseminate a policy widely, nor the failure to conduct an adequate investigation, nor the failure to take prompt and effective action, creates apparent authority in a supervisor to create a sexually hostile working environment.

3. *Apparent Authority Confers Liability Only if the Perpetrator Actually Uses the Authority to Commit the Harassment*

Moreover, in order to impute liability to an employer under § 219(2)(d), a plaintiff must show not only that there was apparent authority, but that the supervisor actually *used* that authority in carrying out the harass-

ment. *Harrison*, 112 F.3d at 1446 (citing *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 579 (10th Cir. 1990) (holding that employer cannot be liable under § 219(2)(d) absent evidence that supervisor "invoked [his] authority in order to facilitate his harassment of plaintiff")). "[I]n order to establish liability on the theory that the supervisor exploited the agency relationship in committing the harassment, a plaintiff 'must allege facts which establish a nexus between the supervisory authority' and the harassment." *Torres v. Pisano*, 116 F.3d 625, 635 (2d Cir. 1997) (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1306 (2d Cir. 1995). *See also Karibian v. Columbia Univ.*, 14 F.3d 773, 708 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994) (distinguishing cases in which supervisor did not actually use authority to further the harassment).

Where a supervisor with the authority to make employment decisions ties submission to sexual demands "to the grant or denial of an economic *quid pro quo*," *Meritor*, 477 U.S. at 65, the misuse of authority is more apparent. There, the supervisor acts on the authority he has been delegated, albeit in an unauthorized manner. *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982).

Absent an economic *quid pro quo*, an employer may be liable for sexual misconduct by a supervisor only under a "hostile environment" theory. Where the supervisor involved does not have ultimate authority to hire and fire, there must be some showing that the supervisor in some way abused the authority he *does* have. *Compare Karibian*, 14 F.3d 773 (2d Cir. 1994) (holding employer liable for "hostile environment" harassment where supervisor with actual authority to alter plaintiff's work schedule and give promotions and raises, and apparent authority to fire, abused that authority by intimidating plaintiff into granting sexual favors) *with Kotcher*, 957 F.2d 59 (2d Cir. 1992) (employer not liable absent notice where

branch manager with some decisional authority engaged in egregious sexual behavior not involving fear of adverse employment consequences).

Similarly, courts evaluating whether the perpetrator was "aided by the agency relationship" require something more than merely some degree of control by the supervisor over the workplace. "In a sense, a supervisor is always 'aided in accomplishing the tort by the existence of the agency' because his responsibilities provide proximity to, and regular contact with, the victim." *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir. 1995). As the District of Columbia Circuit explained, however, "such a reading of section 219(2)(d) 'argues too much.'" *Id.* (quoting *Barnes v. Costle*, 561 F.2d 983, 996 (D.C. Cir. 1997) (MacKinnon, J., concurring)). *Accord Torres*, 116 F.3d at 635 (citing *Gary*) ("But that proves too much, as it would allow the exception to swallow the rule.") "The commentary to the Restatement suggests that this exception embraces a narrower concept that holds the employer liable only if the tort was accomplished by an instrumentality, or through conduct associated with the agency status." *Gary*, 59 F.3d at 1397 (internal quotations omitted).[6] Using established agency principles, the District of Columbia Circuit explained:

> Thus a telegraph company may be held liable for a tort committed by a telegraph operator who sends a false telegraph message, as may the undisclosed principal of a store whose manager cheats a customer. In such cases, "[l]iability is based upon the fact that the agent's position facilitates the consum-

[6] In *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), the Tenth Circuit criticized the District of Columbia Circuit's approach in *Gary* on the grounds that it "effectively merges the first and second clauses of § 219(2)(d)." *Id.* at 1445. Even so, however, the Tenth Circuit noted that "this interpretation does not allow liability to attach where the harasser's agency relationship merely provided him with proximity to plaintiff."

> mation of the [tort], in that from the point of view of the third person *the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.*"

Id. (quoting Restatement § 219 cmt. e) (emphasis added).

It is highly unlikely that hostile environment sexual harassment will "seem[] regular on its face" or that the supervisor creating such an environment would "appear[] to be acting in the ordinary course of the business. . . ." Accordingly, imputing liability to the employer based solely on a lower-level supervisor's minimal managerial responsibilities would be the same as imposing automatic liability on the employer. An individual with any supervisory responsibilities arguably will have *some* degree of authority over some aspect of the work environment. If the second clause of § 219(2)(d) is applicable in hostile environment cases, it requires at the very least that the supervisor be "aided by the existence of the agency" in a sense that he was delegated sufficient authority that could actually be used to create a hostile work environment.

D. Absent an Employee's Reasonable Belief in a Supervisor's Apparent Authority to Commit Sexual Harassment and the Supervisor's Actual Use of Such Authority, an Employer That Is Unaware of a Supervisor's Misconduct and Therefore Unable to Halt the Harassment of an Employee Should Not Be Liable for Environmental Sexual Harassment

1. *"Negligence" Is the Appropriate Standard for Determining an Employer's Liability for Environmental Sexual Harassment by a Supervisor*

Under § 219(2)(b) of the Restatement, an employer is liable for its own negligence where it knew or should have known of an agent's misconduct and failed to take action to stop it. *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996). Virtually all of the

courts of appeals have found, as did the court below, that a "negligence" standard under § 219(2)(b) is appropriate for determining an employer's liability in environmental sexual harassment cases involving supervisors. In the Fifth, Seventh, and Eighth Circuits, it is the *only* proper standard. *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993) ("An employer becomes liable for sexual harassment only if it knew or should have known of the harassment and failed to take prompt remedial action."); *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 495 (7th Cir. 1997) (per curiam), ("the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability"), *cert. granted sub nom. Burlington Indus. v. Ellerth*, 1998 U.S. LEXIS 643 (U.S. Jan. 23, 1998) (No. 97-569); *Davis v. Sioux City*, 115 F.3d 1365 (8th Cir. 1997) (reversing jury verdict where district court failed to instruct the jury that the employer can be liable only if it knew or should have known of the supervisor's harassment and failed to take prompt and appropriate action).

Liability under § 219(2)(b) requires actual or constructive notice to the employer, and a subsequent failure to act.

2. *"Notice" to an Employer Requires Knowledge by Someone Sufficiently High in the Organization That His Acts Are Effectively Those of the Company*

Actual or constructive notice of environmental sexual harassment occurs when a someone who is sufficiently far up in the management hierarchy to constitute notice to the employer acquires knowledge of the conduct. *Cf. EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989) (articulating proper standard as what "management-level employees" knew or should have known).

Knowledge by a low-level supervisor does not suffice. As the Second Circuit explained in *Torres v. Pisano*, 116 F.3d 625, 636-37 (2d Cir. 1997), notice to an employee can be imputed to an employer only where the employee "is at a sufficiently high level in the company's management hierarchy to qualify as a proxy for the company" or "where the person who gained notice of the harassment was the supervisor of the harasser (*e.g.*, had the authority to hire, fire, discipline, or transfer him), [so that] knowledge will be imputed to the employer on the ground that the employer vested in the supervisor the authority and the duty to terminate the harassment." *See also Andrews v. Philadelphia*, 895 F.2d 1469 (3d Cir. 1990) (holding that notice to "middle management" triggered the employer's duty to act).

For the same reasons, an employer is not automatically liable under the "negligence" theory even though the harasser is himself a supervisor. "[A]n employer will not be charged with constructive notice merely because a supervisor is the perpetrator of the harassment." *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir. 1997). *See also Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59 (2d Cir. 1992) (declining to impute knowledge of environmental harassment by branch store manager to company although manager had "decision-making capacity"); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 262 (4th Cir. 1996) ("Although a supervisor, . . . [the perpetrator] was not a proprietor, partner, or corporate officer, and his conduct can be imputed to [the employer] only if [the employer] knew or should have known of it and failed to take prompt and adequate remedial action."); *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 404 (5th Cir. 1993) (holding that "company hierarchy" had no notice until victim complained, even though harasser was a supervisor).

A contrary holding would effectively impose automatic liability. In any company, many relatively low-level em-

ployees have some degree of managerial or supervisory responsibility. A "team leader" may direct the activities of a work group in a manufacturing plant. A "crew chief" may be the titular head of a maintenance crew. Frequently there will be a "lead person" in a two-person truck. These leaders may have some degree of control over when, how and by whom work is performed, and may even have some input into hiring decisions and discipline. But they are unlikely to have ultimate decision-making authority. Imputing notice to such employees to the employer, in effect, would impose automatic liability.

In the instant case, the district court specifically found that none of the supervisors involved—Terry, Silverman or Gordon—qualified as "higher management", Pet. App. at 71a, so that the City did not have actual knowledge of the conduct at issue. *Id.* at 92a. While Ewanchew spoke with the Recreation Supervisor several times about work-related issues, she did not raise the issue of sexual harassment. *Id.* at 81a. Accordingly, the court below correctly ruled that the City could not be held liable for negligence based on actual notice of environmental sexual harassment.

3. *Constructive Notice Based on the Pervasiveness of the Harassment Requires That the Conduct Be Sufficiently Pervasive That Individuals at a Higher Level Should Have Known of It*

An employer also may have notice if a sexually hostile work environment is sufficiently pervasive that the employer has constructive knowledge. Pet. App. 15a. "Pervasiveness," however, also is a necessary element of a hostile environment claim in the first instance. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (quoting *Meritor*, 477 U.S. at 67). "Pervasiveness" for constructive knowledge purposes necessarily is a separate inquiry.

Charging an employer with constructive knowledge of environmental sexual harassment based on the "pervasive-

ness" of the harassment makes sense only if the conduct is sufficiently severe that employees with actual management responsibility should be aware of it. The applicable standard should be functionally the same as the standard applicable when actual notice can be imputed to the employer, *i.e.*, that an employee with "the authority and duty to terminate the harassment" is aware of it.

In the instant case, the court below properly distinguished between the "pervasiveness" necessary to establish an actionable hostile environment, and the "pervasiveness" necessary to establish constructive notice.

II. A WELL-COMMUNICATED EXPRESS POLICY AGAINST SEXUAL HARASSMENT, COUPLED WITH AN ADEQUATE GRIEVANCE PROCEDURE, SHOULD SHIELD AN EMPLOYER FROM LIABILITY FOR SEXUAL HARASSMENT

In *Meritor*, this Court rejected the view that "the *mere existence* of a grievance procedure and *a* policy against discrimination, coupled with [a victim's] failure to invoke that procedure, must insulate [an employer] from liability." 477 U.S. at 72 (emphasis added). The Court criticized the employer's policy in *Meritor* on several grounds: that the policy merely addressed discrimination generally and did not expressly address sexual harassment, and that the complaint procedure required a victim to complain first to her supervisor, who in *Meritor* was also the harasser. *Id.* at 72-73. The Court observed that "[the employer's] contention that [the victim's] failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." *Id.* at 73.

Under any of the agency principles that have been adapted for use in environmental sexual harassment cases, the existence of an express, well-communicated policy against discrimination, coupled with an accessible com-

plaint procedure that leads to prompt and effective action where harassment is found, shield the employer from liability.

A. A Policy Forbidding Sexual Harassment and an Adequate Complaint Procedure Preclude a Finding of Liability Against an Employer on a Negligence Theory

As noted above, the most common theory used by the courts of appeals to evaluate an employer's liability for sexual harassment is one of "negligence," *i.e.* that the employer knew or should have known that the conduct was occurring and failed to take prompt and effective action. Where an employer has in place a policy expressly forbidding workplace sexual harassment, and a procedure that both encourages reporting of harassment and takes prompt steps to eliminate harassment where it is found, the employer cannot be found liable for harassment on a negligence theory.

1. *The Employer Cannot Be Held Liable Where the Victim Fails to Invoke the Complaint Procedure*

Many employers have adopted express policies prohibiting sexual behavior in the workplace. Under many of these policies, sexual conduct may warrant discipline even though it falls short of actionable sexual harassment under Title VII.

These policies usually are tied to complaint procedures that encourage victims to come forward, and that provide more than one avenue of approach, to avoid the possibility exemplified in *Meritor* that a potential victim's only option might be to complain to the harasser. These procedures will provide for a prompt investigation of the complaint, and for appropriate action based on the outcome of the investigation.

When a defendant has in place a policy and procedure meeting these standards, allowing a Title VII recovery to

a plaintiff who has failed to report harassing conduct is tantamount to absolute liability. Where the affected employee does not make use of an anti-harassment policy, the employer has no reason to know that harassing behavior is occurring, unless the conduct is so pervasive that it creates constructive knowledge. Lacking any notice, the employer is unable to take steps to protect the victim. Yet the employer cannot be said to have acted negligently or recklessly, and thus cannot be held liable under a negligence theory. *E.g., Perry v. Harris Chernin, Inc.*, 126 F.3d 1010 (7th Cir. 1997) (employer who published policies and pamphlets against sexual harassment, encouraging employees to come forward, and addressed the issue at employee meetings, not liable for conduct occurring before employee complained).

2. *An Employer That Takes Prompt and Effective Action Upon Learning of Sexual Harassment Cannot Be Held Liable on a Negligence Theory*

Likewise, an employer with an express policy and effective procedure cannot be held liable under a negligence theory where it takes prompt and effective action in response to a complaint. An employer who can show that upon receiving a harassment complaint it conducted a thorough investigation, reached a rational conclusion and took appropriate action is shielded from liability. *E.g., Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 107 (3d Cir. 1994) ("under negligence principles, prompt and effective action by the employer will relieve it of liability"); *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) ("where an employer implements timely and adequate corrective measures after harassing conduct has come to its attention, vicarious liability should be barred regardless of the specific motivation for the wrongdoing or the particular cause of action").

B. A Policy Forbidding Sexual Harassment and an Adequate Complaint Procedure Preclude a Finding of Apparent Authority

As noted above, the EEOC has stated that a strong policy against sexual harassment coupled with an effective complaint procedure eliminates any apparent authority a supervisor might conceivably have to engage in sexual harassment. *See Policy Guidance on Current Issues of Sexual Harassment*, No. N-915-050, *reprinted in, EEOC Compliance Manual* (BNA), N:4031, 4056 (Mar. 19, 1990). The circuit courts that make an "apparent authority" theory available in sexual harassment cases agree. *E.g., Bouton v. BMW of N. Am.*, 29 F.3d 103, 110 (3d Cir. 1994) ("A policy known to potential victims also eradicates apparent authority the harasser might otherwise possess."); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1444 (10th Cir. 1997) (where employer has policy against harassment and complaint procedure, "the victim is likely aware the harassment is not authorized and reliance on apparent authority will be difficult to establish").

CONCLUSION

For the foregoing reasons, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be affirmed.

Respectfully submitted,

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